83-2102

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

THE STATE OF TEXAS, et. al.,

Petitioners,

V.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, et. al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

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QUESTIONS PRESENTED

This case concerns the States' challenge to the constitutionality of the Staggers Act. The question that must be answered in this case is whether the Commerce Clause, alone and without any reliance on the Fourteenth Amendment, can completely override the State sovereignty involved in the regulation of intrastate rail traffic.

The States of Texas and Kansas assert that §214 of the Staggers Act exceeds the power of Congress under the Commerce Clause.

The States assert that §214 of the Staggers Act violates the Tenth Amendment of the United States Constitution.

The States further assert that §214 of the Staggers Act violates the Guaranty Clause of the United States Constitution.

ALL PARTIES IN THE COURT BELOW

STATE OF TEXAS

STATE OF KANSAS

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners.

UNITED STATES OF AMERICA

INTERSTATE COMMERCE COMMISSION

ASSOCIATION OF AMERICAN RAILROADS

THE FLORIDA RAILROADS

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondents.

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NO. _____

IN THE
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THE STATE OF TEXAS, THE STATE OF KANSAS, and NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ASSOCIATION OF AMERICAN RAILROADS, and THE FLORIDA RAILROADS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

Petitioners, THE STATE OF TEXAS and THE STATE OF KANSAS, hereby request certiorari to review, and for summary reversal of, the April 23, 1984 decision of the United States Court of Appeals for the Fifth Circuit that declared the Staggers Act to be constitutional. The decision of the Fifth Circuit upheld the November 3, 1982 decision of the United States District Court for the Western District denying the States' challenge to the constitutionality of the statute.

OPINION BELOW

The April 23, 1984 decision of the Court of Appeals, *State of Texas v. United States*, No. 82-1693, slip op. 3322 (5th Cir. 1984) appears as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on April 23, 1984. This Petition is timely filed within the requirements of 28 U.S.C. §2101(c). A copy of the judgment of the Court of Appeals is set forth in Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The statute being challenged as unconstitutional is 49 U.S.C. §11501. This statute was amended by §214 of the Staggers Act. A copy of this statute is set forth in Appendix B.

Section 11501 is unconstitutional as being in excess of the Federal government's power under the Commerce Clause, "[T]o regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, §8, cl. 3.

Section 11501 is an unconstitutional violation of the Tenth Amendment, which requires that "[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

Section 11501 is an unconstitutional violation of the Guaranty Clause which commands that, "[T]he United States shall guarantee to every State in this Union a Republican form of government . . ." U.S. CONST. art. IV, §4.

STATEMENT OF THE CASE

The State of Texas brought this suit against the United States and Interstate Commerce Commission in the United States Court for the Western District of Texas. Jurisdiction of that Court was had under 28 U.S.C. §1331. The action was for declaratory judgment under 28 U.S.C. §2201. The purpose of the suit was to have certain provisions of the Staggers Rail Act of 1980, Public Law 96-448 (herein the "Staggers Act"), declared unconstitutional. Numerous parties intervened as plaintiffs and defendants in the District Court.

In this Petition for Writ of Certiorari, the States seek to have this Court reverse the decisions of the United States District Court for the Western District and the Court of Appeals for the Fifth Circuit that upheld the constitutionality of §214 of the Staggers Act.

Section 214 of the Staggers Act amended 49 U.S.C. §11501 in a manner that renders that statute unconstitutional.

Subsection (b)(1) of §11501 was amended by the Staggers Act so that State authorities that regulate intrastate transportation provided by rail carriers can continue such regulation only if they exercise "such jurisdiction *exclusively* in accordance" with the new requirements of §11501.

Subsection (b)(4)(A) now provides that states certified by the Interstate Commerce Commission (hereinafter the "ICC"), may use the standards and procedures approved by the ICC for five years.

Subsection (b)(4)(A) also provides that, "[A]ny state authority which is denied certification or which does not seek certification may not exercise any jurisdiction over intrastate rates, classifications, rules, and practices until it receives certification under this subsection."

Subsection (b)(5)(A) provides that certification shall last for five years. At the end of this time, the state must resubmit its intrastate regulatory standards. Subsection (b)(5)(B) provides that during the five-year period a state may not change its certified standards and procedures without notifying and receiving express approval from the ICC.

In addition to the constitutional challenge, the State of Texas filed a Petition for Review in the Fifth Circuit seeking review of the ICC requirement that its rulings must necessarily be incorporated and adhered to by State commissions. The decision of the Fifth Circuit, agreeing with the ICC's lockstep interpretation of the Staggers Act is *Texas v. United States*, No. 83-4318, slip op. 3483 (5th Cir. 1984).

Attached as Appendix C is a copy of *Ex Parte No. 388 (Sub-No. 31) State Intra-state Rail Rate Authority—Texas* (April 20,

1984). By this decision, the ICC decertified the State of Texas and denied it the right to regulate intrastate rail traffic. The decision of the ICC is now subject to review in the United States Court of Appeals for the District of Columbia Circuit. *Railroad Commission of Texas v. United States of America and Interstate Commerce Commission,* No. 84-1180 (D.C. Cir.).

ARGUMENT

I. THE FIFTH CIRCUIT ERRED WHEN IT USED THE "RATIONAL BASIS" TEST OF *HEART OF ATLANTA MOTEL* TO UPHOLD THE STAGGERS ACT.

The Staggers Act was enacted purely for economic reasons. It was not an exercise of Commerce Clause power to protect the Fourteenth Amendment rights of individuals. As a result, the Fifth Circuit was in error in using the "rational basis" test.

Citing decisions of this Court, the Fifth Circuit reasoned that,

> [i]n determining whether the regulated intrastate activity substantially affects interstate commerce, the "rational basis" test governs judicial inquiry. *See, FERC v. Mississippi,* 1982, 456 U.S. 741,753-54, 102 S.CT. 2126,2134-35, 72 L.Ed. 532; *Hodel,* 452 U.S. at 291, 101 S.Ct. at 2368; *United States v. Darby,* 1941, 312 U.S. 100,121, 61 S.Ct. 451,460, 85 L.Ed. 609.

Texas v. United States, No. 82-1693, slip op. at 3333-34 (5th Cir. 1984). In the Fifth Circuit, Texas argued that the "rational basis" test of the Fourteenth Amendment is a standard too deferential to Federal legislative authority exercised solely for economic regulation. No Civil War amendments are implicated in the Staggers Act. As a result, the use of Fourteenth Amendment analysis was error.

Section 5 of the Fourteenth Amendment authorizes "appropriate" legislation to enforce the guarantees of that Amendment. Such legislation is appropriate if the rationality standard of *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316

(1819), is satisfied. *Katzenbach v. Morgan,* 384 U.S. 641,651 (1966).

Both *FERC v. Mississippi,* 456 U.S. 742,753-54 (1982), and *Hodel v. Virginia Surface Mining & Reclamation Association,* 452 U.S. 264,291 (1981), cited by the Fifth Circuit as authority for applying the "rational basis" test to the Staggers Act, relied on *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964), or decisions such as *Hodel v. Indiana,* 452 U.S. 314,323-24 (1981), that cited *Heart of Atlanta Motel's* Fourteenth Amendment analysis. Such reliance on the power of the Fourteenth Amendment in a case dealing only with the Commerce Clause is an error because Congress' power under §5 of the Fourteenth Amendment is limited to adopting measures to enforce the guarantees of the Amendment. *Katzenbach v. Morgan,* 384 U.S. at 651 n. 10.

State sovereignty and the Tenth Amendment are overridden and made irrelevant by the power of the Fourteenth Amendment when the latter constitutional provision is the basis of the statute under review. *Fullilove v. Klutznick,* 448 U.S. 448,476-78 (1980); *Monell v. Department of Social Services,* 436 U.S. 658,690 n. 54 (1978). The principles of state sovereignty "[a]re necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment." *Fitzpatrick v. Bitzer,* 427 U.S. 445,456 (1976). The "[p]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation'." *City of Rome v. United States,* 446 U.S. 156,179 (1980). When properly exercising its Fourteenth Amendment power, "[C]ongress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers." *EEOC v. Wyoming,* 103 S.Ct. 1054,1064 n. 18 (1983).

That *Heart of Atlanta Motel* and its progeny deal with Fourteenth Amendment rights is easily established. The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise. *Woods v. Cloyd W. Miller Co.,* 333 U.S. 138,144 (1948). Federal statutes can be upheld on the basis of §5 of the Fourteenth Amendment without any suggestion in the statute

or the legislative history that Congress acted pursuant to any power other than the Commerce Clause. *EEOC v. Wyoming,* 103 S.Ct. 1054,1064 n. 18 (1983). In both *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241,258 (1941) and *Katzenbach v. McClung,* 379 U.S. 294,303-04 (1964), Congress passed legislation to prevent racial discrimination against blacks. Unlike the Staggers Act, the legislation in these two cases was created to protect the Fourteenth Amendment rights of individuals. In *Heart of Atlanta Motel* this Court was not concerned with economic regulation. It correctly stated that Congress, "[w]as legislating against moral wrongs." *Id.* at 257. In such a circumstance, it was not error to apply the "rational basis" analysis of the Fourteenth Amendment in *Heart of Atlanta Motel.*

The reasoning, in cases such as *Fitzpatrick v. Bitzer* and *City of Rome,* that there is a difference between the power of the Fourteenth Amendment and the Commerce Clause, is in conflict with the reasoning noted in *Hodel v. Virginia Surface Mining & Reclamation Association* and *FERC v. Mississippi,* in which the Fourteenth Amendment analysis of the "rational basis" test was used to determine the constitutionality of statutes enacted pursuant only to the Commerce Clause and which did not apply to individuals. To apply the "rational basis" test in cases not dealing with the Fourteenth Amendment rights of individuals is to ignore the difference between the Commerce Clause and the Fourteenth Amendment.

Some of the Courts of Appeals have also ruled that the Fourteenth Amendment is not limited by the Tenth Amendment. *Crawford v. Pittmen,* 708 F.2d 1028,1037-38 (5th Cir. 1983); *Blake v. City of Los Angeles,* 595 F.2d 1367,1373 (9th Cir. 1979); *Love v. Waukesha Joint School District #1, Board of Education,* 560 F.2d 285,287 (7th Cir. 1977). Like the Supreme Court, three Courts of Appeals have upheld a Federal statute on the basis of the Fourteenth Amendment even though the statute's legislative history did not explicitly rely on the Amendment. These three decisions all concerned the Equal Pay Act. *Marshall v. Owensboro-Davies County Hospital,* 581 F.2d 116,119 (6th Cir. 1978); *Usery v. Charleston County School District,* 558 F.2d 1169,1170 (4th Cir. 1977); *Usery v. Allegheny County Institution District,* 544 F.2d 148,155 (3rd Cir. 1976). In

addition to these decisions, the 1974 amendments to the Age Discrimination in Employment Act, which were upheld by this Court on the basis of the Federal commerce power, *EEOC v. Wyoming,* 103 S.Ct. 1064, were held by the Seventh Circuit to be a "[c]onstitutional exercise of Congress' power under §5 of the Fourteenth Amendment." *EEOC v. Elrod,* 674 F.2d 601,603 (7th Cir. 1982).

Accordingly, the Fifth Circuit was in error when it used Fourteenth Amendment analysis to uphold legislation enacted pursuant to just the Commerce Clause and, in which, there was no attempt to protect the civil rights of individuals.

II. THE STAGGERS ACT IS A REGULATION OF THE "STATES AS STATES."

1.) The Fifth Circuit Incorrectly Ruled That The Staggers Act Was Not A Regulation Of The "States As States" Because The Court's View Of Federal Preemption Was Too Expansive.

The error in applying the "rational basis" test to the Staggers Act also results in an incorrect Tenth Amendment analysis of the statute.

The Fifth Circuit found that the Staggers Act did not come within the first part of the "three-part" test. *Texas v. United States*, slip op. at 3337-38. The Court believed that the Staggers Act did not regulate the "States as States" because §214 of the Act was an attempt to preempt the States' authority outright. *Id.* at 3338. The Court reasoned that "[t]he Act does not compel the states to administer federal law; any state may choose not to regulated." *Id.* at 3342. By terms of the statute, if a state decides not to administer the Federal policy, the ICC assumes control of intrastate rail traffic.

The error in using the "rational basis" test of the Fourteenth Amendment is that it permits an unlimited preemption of state authority and thus renders the "States as States: a meaningless concept. As a result of the fact that the Fourteenth Amendment overrides state sovereignty, Federal statutes

relying on the "rational basis" analysis can be used to preempt outright the essential functions of the States. Once this is done, the statute is not seen as a regulation of the "States as States" because the States have the option not to regulate and can leave the field to Federal administration. If the Fourteenth Admendment's preemption powers are not used, the concept of the "States as States" has some meaning because the extent of Federal preemption is much more limited. In such a situation there are areas of regulation that cannot be completely assumed by the Federal government. Without the total preemption of the Fourteenth Amendment an attempt to require the States to implement Federal policy may be a regulation of the "States as States" because the Federal government cannot constitutionally administer the entire field.

2.) The "Rational Basis" Test Renders "States as States" A Meaningless Concept.

The Fifth Circuit relied on two decisions of this Court for the proposition that if the field has been preempted outright then it is not a regulation of the "States as States" to require them either to administer Federal law or withdraw from the field. These cases were *FERC v. Mississippi* and *Hodel v. Virginia Surface Mining & Reclamation Association. Texas v. United States,* slip op. at 3343.

In *Hodel v. Virginia Surface Mining & Reclamation Association,* Fourteenth Amendment analysis was used to uphold a statute enacted solely on the basis of the Commerce Clause and not intended to protect the civil rights of individuals.

> [C]ongress *rationally* determined that regulation of surface coal mining is necessary to protect interstate commerce from adverse effects that may result from that activity. This Congressional finding is sufficient to sustain the Act as a valid exercise of Congress' power under the Commerce Clause.

Id. at 101 S.Ct. at 2362-63 (emphasis added). In *FERC v. Mississippi,* this Court upheld Federal preemption under the

Commerce Clause using the "rational basis" test. *Id.* 102 U.S. at 2134.

> Our inquiry, then, is whether the congressional findings have a rational basis. *Hodel v. Virginia Surface Mining and Reclamation Ass.*, 452 U.S. at 277, 101 S.Ct. at 2360; *Hodel v. Indiana*, 452 U.S. at 323-324, 101 S.Ct. at 2382.

FERC v. Mississippi, 102 S.Ct. at 2135. Just as in the two *Hodel* cases, *FERC v. Mississippi* found that under the "rational basis" analysis the Federal government could preempt all state regulation in the field, *Id.* 102 S.Ct. at 2140. As a result, state administration of Federal policy was not perceived as being a regulation of the "States as States." *Id.* at 2142 n. 32.

The use of this Fourteenth Amendment analysis eviscerates the "States as States" test. The use of the Fourteenth Amendment to override state sovereignty means that all state economic regulation is preemptible and that such regulation will in no circumstance ever be seen as an essential function of state government.

3.) When Preemption Is Based On The Commerce Clause And Not On The "Rational Basis" Test, The Concept Of The "States As States" Does Prevent Federal Regulation Of Essential State Functions.

The concept of not being able to regulate the "States as States" has its origin in *New York v. United States*, 326 U.S. 572 (1946). Though that case dealt with the power to tax and not the Commerce Clause, both sources of Federal authority have their origin in Art. I, §8, and are analogous. *National League of Cities v. Usery*, 426 U.S. 842,843 n. 14 (1976). In *New York v. United States*, there was no use of the "rational basis" test and no implication of the Fourteenth Amendment. As a result, six of the Justices upholding the Federal tax in question were able to agree that state sovereignty considerations operated to limit the reach of Congress' taxing power. Chief Justice Stone, writing for four members of this Court, stated that,

> [a] federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to *interfere unduly with the State's performance of its sovereign functions of government.*

Id. 326 U.S. at 587 (emphasis added). State sovereignty is "[l]imited by the enforcement provisions of §5 of the Fourteenth Amendment." *Fitzpatrick v. Bitzer,* 427 U.S. at 456. As a result, a reliance on Fourteenth Amendment analysis, in purely Commerce Clause cases such as the *FERC v. Mississippi* and *Hodel* decisions, unnecessarily restricts the concept of the "States as States." It strips the States of those sovereign functions that the Federal government should not be allowed to preempt except in the interests of protecting the individual rights that are guaranteed by the Civil War amendments.

That the "States as States" concept has been unnecessarily limited is also illustrated by *Metcalf and Eddy v. Mitchell,* 269 U.S. 514 (1926). This case, which also dealt with the taxing power, stated that there were "necessary functions of government" for the states that excluded intervention by the Federal government. *Id.* at 522. Such "necessary functions" are similar to those attributes of sovereignty that prevent Congress from regulating the "States as States" not because Congress may lack an affirmative grant of legislative authority "[b]ut because the Constitution prohibits it from exercising the authority in that manner." *Hodel v. Virginia Surface Mining & Reclamation Association,* 101 S.Ct. at 2365 (quoting *National League of Cities,* 426 U.S. at 845). This exemption from Federal power [r]ests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other." *Metcalf and Eddy V. Mitchell,* 269 U.S. at 523.

Not only have the recent formulations of the "States as States" concept unnecessarily limited its application, but they have also applied it as a rigid test in a manner that defeats its purpose.

When trying to decide what state activities are "necessary functions" exempt from Federal preemption, "[E]xperience has

shown that there is no formula by which that line may be plotted with precision in advance." *Id.* at 523. A simple test distinguishing between the sovereign functions of the States and the Federal government is impossible. As James Madison explained in delineating the boundary between Federal and state jurisdictions, the Constitutional Convention experienced in full the problems of vague and incorrect definitions. *The Federalist,* No. 37 at 270,71 (J. Madison) (B. Wright Ed. 1961). When dissenting from this Court's use of the market participant theory in *Hughes v. Alexandria Scrap,* 426 U.S. 794 (1976), Justice Brennan argued against a rigid reliance on tests to determine what state actions are not subject to the Federal commerce power. In doing so he relied on Justice Frankfurter's statement that,

> In the history of the Supreme Court no single quality more differentiates judges than the acuteness of their realization that practical considerations, however screened by doctrine, underlie resolution of conflicts between state and national power.

Id. at 828 (Brennan, J. dissenting) (quoting F. Frankfurter, the Commerce Clause under Marshall, Tanney and Waite 33-34 (1937)). Similarly, in his dissent, in *Fry v. United States,* 421 U.S. 542 (1975) (Rehnquist, J. dissenting), Justice Rehnquist wrote that in deciding which traditional state functions are beyond Congress' commerce authority rigid tests should not be employed. "Such a distinction would undoubtedly present gray areas to be marked out on a case-by-case basis, as is true in applying any number of other constitutional principles." *Id.* at 558.

In order to protect those essential functions of state sovereignty that cannot be preempted by the use of just the Federal commerce power, the Courts must not rely on a rigid test or formula but must engage in a flexible balancing process that will recognize threats to the separate and independent existence of the States.

4.) The Staggers Act Is An Unconstitutional Intrusion on State Sovereignty.

The Tenth Amendment "[e]xpressly declares the constitutional policy that Congress may not exercise power in

a fashion that impairs the States' integrity, or their ability to function effectively in a federal system." *Fry v. United States,* 421 U.S. 542,547 n. 7 (1975). The power to regulate intrastate rail traffic is a traditional function of the States. *Minnesota Rate Cases,* 230 U.S. 352 (1913). In fact, it was only after this Court's decision in *Wabash, St. Louis and Pacific Railway Co. v. State of Illinois,* 118 U.S. 557 (1886), which dealt with an Illinois statute regulating railroads, that Congress created the ICC. Furthermore, this traditional function contains within it elements of the States' sovereignty. "Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v. Mississippi,* 102 S.Ct. at 2138. The question that must be answered in this case is whether the Commerce Clause, alone and without any reliance on the Fourteenth Amendment, can *completely* override the state sovereignty involved in the regulation of intrastate rail traffic. To resolve this question requires a flexible balancing approach.

In Justice Frankfurter's words, one must look to the "practical considerations" that underlie the resolution of conflicts between state and national power.

In *FERC v. Mississippi,* this Court cited *Testa v. Katt,* 330 U.S. 386 (1947), for the proposition that there are circumstances in which Congress can require that the States enforce Federal regulations. *FERC v. Mississippi,* 102 S.Ct. at 2137-39.

> And certainly *Testa v. Katt, supra,* by declaring that "the policy of the federal Act is the prevailing policy in every state," 330 U.S. at 393, 67 S.Ct. at 814, reveals that the Federal Government has *some power* to enlist a branch of state government—there the judiciary—to further federal ends.

Id. at 2139 (emphasis added). The difference between the burdens placed on the States' courts by the Emergency Price Control Act in *Testa v. Katt* and the requirements imposed on the States by the Staggers Act is that *Testa v. Katt* did not involve the complete elimination of independent state authority. As this Court stated in *Testa v. Katt,* the Federal government "has some power" to enlist a branch of state government to

further Federal ends. That statement acknowledges that the Federal power is not complete. The decision in *Testa v. Katt* also recognized that "[C]ongress must respect the state institution's own decision making structure and method." *FERC v. Mississippi*, 102 S.Ct. at 2145 n. 4 (Powell, J. concurring and dissenting).

It would have been impossible for the Emergency Price Control Act to completely federalize the state courts. *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1847), stands for the proposition that Congress may not authorize the Supreme Court to replace state courts as the court of last resort as regards statue statutory and common law. This restriction of Federal power rested not so much on a construction of Federal statutes as "[o]n general principles the jurisdiction extended no further." *Id.* at 630. Later, in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), this Court was pleased to avoid the "constitutional shoals" of interpreting 42 U.S.C. §1985(3) "as a general federal tort law." *Id.* at 102.

Unlike *Testa v. Katt*, in which the Federal government had "some power" to enlist a branch of state government to further federal ends, the Staggers Act attempts to completely absorb state commissions into the Federal administrative apparatus. The Seventh Circuit found that a "discrete reading" of the Staggers Act requires that, "[c]onsistent rulings of the ICC must necessarily be incorporated and adhered to by state commissions pursuant to the Staggers Act." *Illinois Central Gulf Railroad Co. v. ICC*, 702 F.2d 111,115 (7th Cir. 1983). Two other courts of Appeals also interpret the Staggers Act to require that the States regulating intrastate rail traffic follow ICC decisions in this lockstep manner. *Texas v. United States*, No. 83-4318, slip op. at 3493-94 (5th Cir. 1984), and *Wheeling-Pittsburgh Steel Corp. v. ICC*, 723 F.2d 346, 354-55 (3rd Cir. 1983).

If the States do not perform as extensions of the Federal government, they are decertified and lose all authority to regulate intrastate rail traffic. This happened to Texas recently in the ICC's *Ex Parte No. 388 (Sub-No. 31) State Intrastate Rail Rate Authority—Texas* (April 20, 1984). Such a

complete ouster of State authority is an unconstitutional intrusion upon the States.

Recent decisions of this Court upholding Federal statutes as not being unconstitutional subvertions of State power all dealt with statutes that did not completely eliminate independent State authority. In *FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126,2140 72 L.Ed. 532 (1983), because Titles I and III of the Public Utility Regulatory Policies Act only required consideration of Federal standards, they were not perceived as threatening the separate and independent existences of the States. In *EEOC v. Wyoming*, 103 S.Ct. 1054,1062 (1983), the 1974 amendments to the Age Discrimination in Employment Act only required the state to achieve its goals in a "more individualized and careful manner" but did not require the state to abandon its goals "or to abandon the public policy underlying them." In *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, this Court reasoned that,

> The most that can be said is that the Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.

Id. at 2366. In contrast, the Staggers Act requires that rulings of the ICC be "incorporated and adhered to by state commissions." *Illinois Central Gulf Railroad Co. v. ICC*, 702 F.2d 111,115.

If *Testa v. Katt* stands for the proposition that the Federal government does have "some power" to require States to enforce Federal policies, that limited power is particularly unsuited for requiring that State agencies become part of the Federal government. The subversion of local political mechanisms involved in requiring State administrative officials to enforce locally unpopular federal measures is greater than when state judges are required to apply Federal law. Traditionally, judges have been more insulated from political sentiment. In contrast, administrative officials who by the nature of their jobs must

make and implement government policies, have been made more politically responsive. The people of the State of Texas, by and through their Legislature, created the Railroad Commission of Texas (the "Commission"), and provided that the Commission, "[s]hall be composed of three members, one of whom shall be elected bienially at each general election for a term of six years." TEX.REV.CIV.STAT.ANN. art. 6447. By imposing an unpopular economic policy on State officials, the Congress rendered the votes of Texans meaningless. In *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966), this Court rejected voting restrictions that applied to all the voters in the State. Writing for the majority, Justice Douglas stated,

> Long ago in *Yick Wo v. Hopkins,* 188 U.S. 356,370, 6 S.Ct. 1064, 1071, 30 L.Ed. 220,226, the Court referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights." Recently in *Reynolds v. Sims,* 377 U.S. 533,561-62, 84 S.Ct. 1362,1381, 12 L.Ed2d 506, we said, "undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society." (Rest of quotation omitted.)

Id. at 667. Now, with the passage of the Staggers Act, the franchise has been restricted for all Texans. They can no longer influence intrastate rail policies by their votes.

If, as the States believe, the Commerce Clause does not authorize the complete ouster of State power over intrastate rail traffic, the Staggers Act is an unconstitutional regulation of the "States as States." The Federal government should not be permitted to interfere in matters for which it will not widely be deemed responsible. *Hampton v. Mow Sun Wong,* 426 U.S. 88,114,116 (1976). To permit such an interference and to allow the ICC to dictate policy when the complete ouster of State authority is impossible under the Commerce Clause is to ignore the nature of the Federal system.

That the Staggers Act is unconstitutionally intrusive is also illustrated by the fact that its attacks on State sovereignty are far in excess of what was required.

5.) The Means Selected In The Staggers Act Are Far In Excess Of What The Situation Required.

As a result of the financial troubles of railroads in the northeast and midwest, Congress began passing legislation to deregulate the railroads and improve their profits. *Texas v. United States,* No. 82-1693, slip op. at 3327-28. Temporary enactments have sometimes overridden state sovereignty when those statutes were enacted at times of national emergency. The statute in *Testa v. Katt,* the Emergency Price Control Act of 1942, was one such statute. It was enacted during World War II. In its decision in *National League of Cities v. Usery,* 426 U.S. 842 (1976), this Court explained that it chose not to overrule the decision in *Fry v. United States* because,

> The enactment at issue there was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall. *The means selected were carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time.*

Id. at 853 (emphasis added). No such careful selection of means was made in the Staggers Act.

The irony of the decertification of the State of Texas is that the ICC used the Staggers Act, a statute designed to help financially troubled railroads, to decertify a state where railroads are prosperous. The energy crisis has delivered a veritable bonanza to Texas' railroads.

Large utilities in the State of Texas are now dependent on supplies of coal brought by rail from the States of Montana and Wyoming. This is captive traffic for which there is no other means of transportation. This traffic has been used to subsidize the Texas railroads. As an example of this practice, in 1975 the Burlington Northern and the Southern Pacific received a per ton rate for the movement of coal from the State of Wyoming to San Antonio, Texas that was at least twice that of other rates

applicable to coal movement by unit trains. *Burlington Northern, Inc. v. United States,* 555 F.2d 637,639 (8th Cir. 1977). The ICC also permitted high rates on captive coal traffic moving to Houston, Texas over the track of the Burlington Northern and the Atchison, Topeka and Santa Fe railways. Even though the Court of Appeals for the District of Columbia had problems understanding the ICC's methodology, it upheld the high coal rates as a subsidy necessary to "yield adequate overall revenues." *Houston Lighting and Power Co. v. United States,* 606 F.2d 1131,1148 (D.C. Cir. 1979).

If the Staggers Act is supposed to be a response to a "national emergency," it fails the test explained in *National League of Cities v. Usery*, 426 U.S. 842,853. Unlike the railroads of the northeast, the railroads serving the State of Texas were not impoverished. The ICC used the utility rate payers of Texas to ensure prosperity for the railroads of the State. There was no crisis that "endangered the well-being of all the component parts of our federal system." *Id.* Also, the Staggers Act does not limit the new Federal power to a "very limited, specific period of time." *Id.* As a result, the draconian powers given the Federal government by the Staggers Act are an unnecessary interference both with the States' essential functions and with the federal nature of the Union.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted and the decision below should be summarily reversed.

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APPENDIX A

APPENDIX A

The STATE OF TEXAS, et al., Plaintiffs-Appellants,

National Association of Regulatory Utility Commissioners and State Corp. Commission of the State of Kansas, Plaintiffs-Intervenors-Appellants

v.

**UNITED STATES of America and Interstate Commerce Commission,
Defendants-Appellees,**

and

**Southern Pacific Transportation Company, et al.,
Defendants-Intervenors-Appellees.**

No. 82-1693.

United States Court of Appeals,
Fifth Circuit.

April 23, 1984.

Appeals from the United States District Court for the Western District of Texas.

Before WISDOM, REAVLEY and JOHNSON, Circuit Judges.

WISDOM, Circuit Judge:

This appeal involves a facial attack on the constitutionality of sections 201, 202, 203, and 214 of the Staggers Rail Act of 1980,[1] 49 U.S.C.A. §§10501, 10701a, 10707a, 10709, 11501 (1983). Seeking a declaratory judgment that the challenged sections of the Staggers Act are unconstitutional, the State of Texas initiated this case on December 12, 1980, by filing suit against the United States and the Interstate Commerce Commission (ICC). Numerous parties intervened as plaintiffs and defendants. After receiving cross motions for summary judgment and hearing oral argument on those motions, the district court issued an order granting summary judgment to the defendants and the defendant-intervenors, denying summary judgment to the plaintiff and the plaintiff-intervenors, and dismissing the case with prejudice. The plaintiff and two plaintiff-intervenors have appealed that order. We affirm.

I.

The Staggers Act is an attempt to revitalize the nation's railroad system by substantially deregulating rate-setting for interstate rail carriers. In essence, the Act alows interstate rail carriers that operate in competitive markets to establish their own rates. To eliminate regulatory lag and to ensure that the federal goal of deregulation is not thwarted by continued state regulation, the Act displaces the authority of the states independently to regulate the intrastate rates of interstate rail carriers. The appellants argue that these two aspects of the Act—deregulation of rate-setting and displacement of independent state regulation—violate various provisions of the Constitution. A brief review of the previous system of regulation is necessary to understand completely these two aspects of the Act.

In 1973, the bankruptcy of certain major railroads in the northeast and midwest regions of the country threatened the national welfare. Seven of these railroads, including the Penn Central with its huge system, were located principally in the Northeast. Congress responded with an innovative program designed to replace the inefficient, costly, and often duplicative

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[1] Pub.L. No. 96-448, 94 Stat. 1895 (codified in various sections of 11, 45, and 49 U.S.C.A. (1983)).

insolvent lines with a new and economically viable rail system, Consolidated Rail Corporation (Conrail). Regional Rail Reorganization Act of 1973, Pub.L. No. 93-236, 87 Stat. 985 (1974) (codified as amended at 45 U.S.C.A. §§ 701-797m (1983)). Although this legislation offered hope for improvement in the Northeast Corridor, by 1976 Congress recognized the necessity for introducing substantial nationwide changes in the regulation of railroad rates and service conditions. The railroad industry was in serious financial trouble, largely because the industry had become overregulated while competing modes of transportation remained for the most part unregulated.[2] Accordingly, Congress inaugurated a policy of deregulating railroad rate-setting by enacting the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub.L. No. 94-210, 90 Stat. 31 (codified as amended at 45 U.S.C.A. §§ 801-855 (1983)). Since the enactment of the Interstate Commerce Act in 1887, the ICC had used the "just and reasonable" standard to review the rates of carriers subject to its jurisdiction. Under the 4R Act, the ICC could not find a railroad rate unjust or unreasonable unless the Commission had first determined that the carrier could exclude effective competition to such an extent that the carrier could be said to have "market dominance".[3] *See* 4R Act § 202(b), 90 Stat. at 35.

Four years later, Congress found that the railroad industry was still plagued by the same financial problems that faced it in 1976.[4] Deregulation of railroad rate-setting under the 4R Act was not proceeding quickly enough.[5] Congress enacted the

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[2] *See* S.Rep. No. 499, 94th Cong., 2d Sess. 2-3, 10-15 *reprinted in* 1976 U.S.Code Cong. & Ad. News 14, 15-17, 23-29.

[3] The 4R Act defined "market dominance" as "an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies". 4R Act § 202(b), 90 Stat. at 35. The slightly amended version of this definition is at 49 U.S.C.A. § 10709(a) (1983).

[4] *See* Staggers Act § 2(4), (6), (7), (9); H.R.Rep. No. 1035, 96th Cong., 2d Sess. 34-37, 53, 95-119, *reprinted in* 1980 U.S.Code Cong. & Ad.News 3978, 3979-82, 3998, 4039-63 [hereinafter cited as House Report; page references to U.S.Code Cong. & Ad.News are provided in brackets]; H.Conf.Rep. No. 1430, 96th Cong., 2d Sess. 79-80, *reprinted in* 1980 U.S.Code Cong. & Ad. News 4110-11 [hereinafter cited as Conference Report; page references to U.S.Code Cong. & Ad. News are provided in brackets].

[5] House Report, note 4, at 38, 115-19 [3983, 4059-63]; Conference Report, note 4, at 89 [4120-21].

Staggers Rail Act of 1980, making dramatic changes designed to give carriers the freedom to set competitive rates determined mainly by market forces.[6] Section 201 of the Act establishes the basic premise of deregulation:

> "(a) Except as [otherwise] provided . . . a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission . . . may establish any rate for transportation or other service provided by the carrier.
>
> "(b)(1) If the Commission determines, under section 10709 of this title, that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable."

49 U.S.C.A. § 10701a(a), (b) (1983). Section 202 of the Act amends the application of the "market dominance" concept so as to free more railroad traffic from rate regulation. *See id.* § 10709(d). Section 203 creates a permissible zone of rate flexibility, within which rate increases enjoy a qualified immunity from reasonability challenges. *Id.* § 10707a.

The Staggers Act also institutes a major reallocation of regulatory authority between the federal and state governments. Previously, a dual jurisdictional system of regulation governed rate-setting by interstate rail carriers. The ICC exercised plenary jurisdiction over rail transportation between different states and between the United States and other countries. *See* 49 U.S.C.A. § 10501(a) (1983). Section 10501(b) of title 49 specifically prohibited ICC jurisdiction over rail transportation "entirely in a State", and primary jurisdiction over intrastate rates and services remained in the individual state regulatory commissions. Section 10501(c) provided that, unless a state requirement conflicted with an order of the ICC or was expressly prohibited by the Interstate Commerce Act, the authority

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[6] *See Western Coal Traffic League v. United States*, 5 Cir.1983 (en banc), 719 F.2d 772, 777, 778 & n. 10, noting that the Staggers Act was enacted to hasten deregulation.

granted the ICC by Congress "does not affect the power of a State, in exercising its police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission."

In connection with this division of regulatory jurisdiction between the ICC and the states, the ICC exercised a role of limited review over intrastate rate-setting. Codified at 49 U.S.C.A. § 11501 (1983), this reviewing role recognized two circumstances in which the ICC would establish intrastate rates for rail carriers otherwise subject to the Commission's jurisdiction: (1) when the Commission found, after notice and a hearing, that a rate, classification, rule, or practice established by a state regulatory agency caused unreasonable discrimination against or an unreasonable burden on interstate or foreign commerce, *id.* § 11501(a);[7] or (2) when

> "(A) a rail carrier files with an appropriate State authority a change in an intrastate rate, or a change in a classification, rule, or practice that has the effect of changing an intrastate rate, that adjusts the rate to the rate charged on similar traffic moving in interstate or foreign commerce; and
>
> "(B) the State authority does not act finally on the change by the 120th day after it was filed",

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[7] This form of review over intrastate rates dates from the Supreme Court's 1914 decision in *Houston, E. & W.T. Ry. v. United States (Shreveport Rate Case)*, 1914, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341. In this decision, the Court held that the ICC had implicit authority under the Interstate Commerce Act to establish intrastate rate levels in cases in which intrastate rates, though lawfully established by a state commission, discriminated against interstate commerce. Although at the time the *Shreveport Rate Case* was decided Congress had not expressly granted the ICC any intrastate rate authority, the Court found that the Commission's authority to adjust intrastate rates was necessary to protect interstate commerce. In the Transportation Act of 1920, ch. 91, § 416, 41 Stat. 456, 484, Congress codified the *Shreveport Rate Case* holding by amending the Interstate Commerce Act to provide that the ICC may establish an intrastate rate if a state-set rate was found to interfere unreasonably with interstate commerce.

Id. § 11501(d)(1).[8] Beyond these two specific instances, states and their regulatory commissions were free to determine intrastate rail policy.

As noted above, the basic purpose of the Staggers Act is to revive the railroad industry by hastening the deregulation of railroad rate-setting. In addressing this purpose, Congress found that the dual federal-state regulatory structure was causing substantial costs to interstate rail carriers.[9] Congress found these losses to result partly from a lack of uniform standards and partly from the regulatory delay inherent in the dual system.[10] The congressional response to this problem was to eliminate independent state regulation of the intrastate rates of interstate rail carriers. To this end, section 214 of the Staggers Act radically revises the regulatory structure governing intrastate rail rates and services.

Section 214 preempts outright all state jurisdiction over general rate increases,[11] inflation-based rate increases, and fuel adjustment surcharges.[12] 49 U.S.C.A. § 11501(b)(6) (1983). If a state wishes to continue regulating other types of intrastate rate adjustments for interstate carriers, the ICC must certify that the state's standards and procedures conform to those of the Interstate Commerce Act. *Id.* § 11501(b)(1)-(3). States that do not seek, or that fail to receive, ICC certification cannot exercise any jursidiction over the intrastate rates of interstate

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[8] This second mode of review over state rate regulation was added by § 210 of the 4R Act, 90 Stat. at 46.

[9] It was estimated that the disparity between intrastate rates and interstate rates caused interstate rail carriers a total revenue loss of $400,000,000 in 1977. House Report, note 4, at 61 [4006].

[10] *Indianapolis Power & Light Co. v. ICC*, 7 Cir.1982, 687 F.2d 1098, 1100; House Report, note 4, at 61, 128-30 [4006, 4072-74].

[11] "General rate increases" are those that are adopted by a large number of carriers and that apply nationally or throughout broad regions of the country to all or a large number of commodities or services. *Indianapolis Power & Light Co. v. ICC*, 7 Cir.1982, 687 F.2d 1098, 1100 & n. 2; *id.* at 1106 (Pell, Jr., concurring in part and dissenting in part).

[12] *See Louisville & N.R.R. v. Kentucky Utils. Co.*, W.D.Ky.1982, 535 F.Supp. 244, 247-48.

railway carriers. *Id.* §§ 10501(c)(1), 11501(b)(4)(A).[13] In states in which certification has been denied, the ICC assumes jurisdiction over all rate-setting by interstate carriers. *Id.* § 11501(b)(4)(B). If a state has received ICC certification, a decision of the certified state agency can be challenged and reversed on the ground that the agency reached its decision using regulatory standards and procedures not in accordance with the provisions of the Interstate Commerce Act. *Id.* § 11501(c). The ICC certification of a state authority is valid for five years; during this period, any changes in the certified standards and procedures must be expressly approved by the ICC. *Id.* § 11501(b)(5). At the end of the five-year period, the ICC certification of a state authority must be renewed. *Id.* § 11501(b)(5)(A).

[1] In short, section 214 of the Staggers Act establishes a two-step process to compel state regulators to employ federal law when regulating intrastate rates of interstate rail carriers. First, to avoid complete federal preemption, a state agency must receive ICC certification of its standards and procedures. Second, to avoid ICC reversal of its decisions, a certified state agency must exercise its authority in accordance with the standards and procedures of the Interstate Commerce Act. Thus, although the Staggers Act grants the states the option of continuing to regulate intrastate rail rates, the Act is in nature a preemptive statute. If a state wishes to continue regulating, it must do so in accordance with federal policy.[14]

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[13] "This subtitle does not affect the power of a State, in exercising its police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission under this subchapter *unless (1) the transportation is deemed to be subject to the jurisdiction of the Commission pursuant to section 11501(b)(4)(B) of this title, or (2) . . .*" 49 U.S.C.A. §10501(c) (1983) (emphasis added). "Any State authority which is denied certification or which does not seek certification may not exercise any jurisdiction over intrastate rates, classifications, rules, and practices until it receives certification under this subsection."
Id. § 11501(b)(4)(A).

[14] There is some disagreement among the parties as to the extent to which certified state agencies must follow the policies and decisions of the ICC. The Court of Appeals for the Seventh Circuit has held that "consistent rulings of the ICC must necessarily be incorporated and adhered to by state commissions exercising jurisdiction pursuant to the Staggers Act". *Illinois Central Gulf R.R. v. ICC*, 7 Cir.1983, 702 F.2d 111, 115.
In ruling on the appellants' facial attack on the constitutionality of the Staggers Act, it is not necessary for this Court to decide this question of statutory

[2] In concluding that the Act is preemptive, we are mindful of the clear-statement rule of statutory construction governing such a conclusion. Under this rule, a court cannot find that a federal law preempts state regulation of an activity historically regulated by the states, unless Congress has given a "clear statement" of its intent to preempt:

> "Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and mainfest purpose of Congress.' This assumption provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts. But when Congress has 'unmistakably . . . ordained' that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."

Jones v. Rath Packing Co., 1977, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (citations omitted). *Accord Florida Lime & Avocado Growers, Inc. v. Paul*, 1963, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248; *California v. Zook*, 1949, 336 U.S. 725, 733, 69 S.Ct. 841, 845, 93 L.Ed. 1005; *Rice v. Santa Fe Elevator Corp.*, 1947, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447; *Savage v. Jones*, 1912, 225 U.S. 501, 537, 32 S.Ct. 715, 727, 56 L.Ed. 1182.

The preemption of state law implicit in the goals and operation of the Staggers Act is unmistakable. One of the Act's primary purposes is the elmination of the previous lack of uniformity in standards and procedures that governed rate-setting by interstate rail carrier (*see* notes 9-10), and the cert-

(footnote continued from previous page)

construction. For the purpose of analyzing the appellants' tenth amendment argument, we assume without deciding that the Act leaves certified state agencies no significant amount of discretion.

ification procedure of section 214 of the Act is tailored to this purpose. When Congress seeks to end a situation of conflicting regulatory schemes and to establish uniform regulatory standards, it has clearly manifested its intent to preempt state law. *See City of Burbank v. Lockheed Air Terminal, Inc.*, 1973, 411 U.S. 624, 633, 638-39, 93 S.Ct. 1854, 1859, 1862-63, 36 L.Ed.2d 547; *Campbell v. Hussey*, 1961, 368 U.S. 297, 300-01, 82 S.Ct. 327, 328-29, 7 L.Ed.2d 299; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 234, 67 S.Ct. at 1154; *Hines v. Davidowitz*, 1941, 312 U.S. 52, 72-74, 61 S.Ct. 399, 407-408, 85 L.Ed. 581.

That Congress intended the Staggers Act to preempt state law is manifest not only by the purpose and operation of the statute, but also by the language of the statute and of its legislative history. Section 214(b) of the Act provides that a state agency may exercise jurisdiction over the intrastate rates of interstate carriers "*only* . . . if such State authority exercises such jurisdiction *exclusively* in accordance with the provisions of this subtitle". 49 U.S.C.A. § 11501(b)(1) (1983) (emphasis added). Even more explicit is the language of the House Conference Report:

> "The conferees' intent is to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals. Accordingly, *the Act preempts state authority* over rail rates, classifications, rules, and practices. States may only regulate in these areas if they are certified under the procedures of [section 214]."

Conference Report, note 4, at 106 [4138] (emphasis added); *see also* House Report, note 4, at 221 [4104] (separate views of Rep. Murphy); *id.* at 225-26 [4107-09] (statement of Reps. Gramm, Stockman, Shelby, Santini, Eckhardt, and Satterfield). Of course, such explicit statements are dispositive of the issue of congressional intent to preempt state law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. at 142, 146-47, 83 S.Ct. at 1217, 1219-20; L. Tribe, *American Constitutional Law* § 6-26, at 386 (1978).

II.

The appellants attack the facial constitutionality of the Staggers Act on four fronts. They argue that: (A) section 214 of the Act exceeds the power of Congress under the commerce clause; (B) section 214 violates the tenth amendment; (C) section 214 violates the guaranty clause; and (D) sections 201 through 203 of the Act effect an unconstitutional "taking" of property without just compensation.[15] We hold that the Act withstands all four attacks.[16]

III.

A.

The appellants assert that the commerce clause does not confer upon Congress the authority to enact the preemption scheme of section 214 of the Staggers Act. We disagree.

[3] Under accepted commerce clause analysis, the task of a court asked to determine whether a particular act of Congress is a valid exercise of the commerce power is narrow. The court must defer to a congressional finding that a regulated activity substantially affects interstate commerce, as long as there is any rational basis for such a finding. This established, the only remaining question for judicial inquiry is whether there is a reasonable connection between the regulatory means selected and the asserted ends. *E.g., Hodel v. Indiana,* 1981, 452 U.S. 314, 323-41, 101 S.Ct. 2376, 2382-83, 69 L.Ed.2d 40; *Hodel v. Virginia Surface Mining & Reclamation Association,* 1981, 452 U.S. 264, 276, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1; *Heart of*

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[15] The appellants argued before the district court that the Act's "market dominance" provisions violate the rights that "captive shippers" possess under the equal protection component of the fifth amendment's due process clause. The appellants do not renew this argument on appeal. Therefore, we do not address it.

[16] All of these arguments, except for the guaranty clause argument, were considered and rejected by the United States District Court for the District of Montana, which upheld the facial constitutionality of the Staggers Act. *See Montana ex rel. Montana Dep't of Agriculture v. United States,* D.Mont. Sept. 9, 1983 (No. CV-81-29-GF), *appeal filed,* 9 Cir. Oct. 25, 1983 (No. 83-4246).

Atlanta Motel, Inc. v. United States, 1964, 379 U.S. 241, 258, 85 S.Ct. 348, 358, 13 L.Ed.2d 258.

[4] Section 214 of the Staggers Act clearly passes constitutional muster under the "minimum scrutiny" test required by accepted commerce clause analysis. At least since 1914, the courts have recognized that the regulation of intrastate railroad rates has a direct and substantial effect on interstate commerce. *Houston East & West Texas Railway v. United States (Shreveport Rate Case),* 1914, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341. *See also Railroad Commission v. Chicago, Burlington & Quincy Railroad,* 1922, 257 U.S. 563, 588, 42 S.Ct. 232, 237, 66 L.Ed. 371. The information presented to Congress during its consideration of the Staggers Act furnished ample evidence that independent state regulation of the intrastate rates of interstate rail carriers was imposing substantial costs upon those carriers.[17] It is undeniable, therefore, that there is a rational basis for the congressional finding of a substantial effect upon interstate commerce. It is equally clear that there is a reasonable connection between the regulatory means chosen—preemption of independent state regulation—and the asserted objective—deregulation of rate-setting for interstate carriers. Under accepted commerce clause reasoning, then, section 214 is a valid exercise of the commerce power.[18]

The appellants argue that, for three separate reasons, this Court should depart from accepted commerce clause reasoning in adjudging the validity of section 214 as an exercise of the commerce power. First, citing the *Shreveport Rate Case,* 234 U.S. at 351, 353, 34 S.Ct. at 836, 837, and *Railroad Commission v. Chicago, Burlington & Quincy Railroad,* 257 U.S. at 590-91, 42 S.Ct. at 238, the appellants argue that Congress can regulate intrastate commerce only if such regulation is necessary to protect interstate commerce from unreasonable

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[17] *See* sources cited in notes 4, 9-10.

[18] Two other courts have reached the same conclusion. *See Montana ex rel. Montana Dep't of Agriculture v. United States,* D.Mont. Sept. 9, 1983, slip op. at 3-4 (No. CV-81-29-GF) *appeal filed,* 9 Cir. Oct. 25, 1983 (No. 83-4246); *Louisville & N.R.R. v. Kentucky Utils. Co.,* W.D.Ky. 1982, 535 F.Supp. 244, 246.

burdens. Because the prior regulatory regime allowed the ICC to overturn state-set rates found to discriminate against or burden interstate commerce unreasonably, the appellants contend, the prior regime was sufficient to protect interstate commerce from injurious intrastate rates. They say, therefore, that section 214 of the Staggers Act is both unnecessary and excessive, for it fails to distinguish burdensome state regulation from non-burdensome state regulation.

[5, 6] This argument rests on erroneous premises. The Supreme Court decided the *Shreveport Rate Case* and the *Railroad Commission* case at a time when the commerce power was considered to reach only activities that were "in" interstate commerce or that exerted a "direct" effect on interstate commerce. *See, e.g.*, Stern, *The Commerce Clause and the National Economy, 1933-1946* (pt. 1), 59 Harv.L.Rev. 645, 647-53 (1946). These decisions predate the development of contemporary commerce clause analysis and therefore cannot be considered to express accurately the extent of the commerce power. For over 40 years now, the Supreme Court has held that a purely intrastate activity may be regulated by Congress, as long as the cumulative effect of the activity substantially affects interstate commerce. *See Wickard v. Filburn*, 1942, 317 U.S. 111, 127-28, 63 S.Ct. 82, 90-91, 87 L.Ed. 122; *see also United States v. Wrightwood Dairy Co.*, 1942, 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726; *Katzenbach v. McClung*, 1964, 379 U.S. 294, 300-01, 85 S.Ct. 377, 381-82, 13 L.Ed.2d 290; *Fry v. United States*, 1975, 421 U.S. 542, 547, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363; *Hodel v. Virginia Surface Mining & Reclamation Association*, 1981, 452 U.S. 264, 281, 101 S.Ct. 2352, 2362, 69 L.Ed.2d 1. As the Supreme Court recently stated,

> "[T]his Court has made clear that the commerce power extends not only to 'the use of channels of interstate or foreign commerce' and to 'protection of the instrumentalities of interstate commerce . . . or persons or things in commerce,' but also to 'activities affecting commerce.' *Perez v. United States*, 402 U.S. 146, 150, 28 L.Ed.2d 686, 91 S.Ct. 1357 [1359] (1971). As we explained in *Fry v. United States*, [421 U.S. at 547, 95 S.Ct. at 1795], '[e]ven activity that is purely intrastate in character may be regulated by Con-

> gress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.'"

Hodel, 452 U.S. at 276-77, 101 S.Ct. at 2360-61 (citations omitted).[19] And in determining whether the regulated intrastate activity substantially affects interstate commerce, the "rational basis" test governs judicial inquiry. *See FERC v. Mississippi,* 1982, 456 U.S. 742, 753-54, 102 S.Ct. 2126, 2134-35, 72 L.Ed.2d 532; *Hodel,* 452 U.S. at 291, 101 S.Ct. at 2368; *United States v. Darby,* 1941, 312 U.S. 100, 121, 61 S.Ct. 451, 460, 85 L.Ed. 609. Thus, it is simply not true that Congress can regulate intrastate commerce only to protect interstate commerce from unreasonable burdens.

[7] Moreover, whether section 214 of the Staggers Act is unnecessary or excessive in light of the objectives of Congress is a question that courts are neither well suited nor constitutionally authorized to decide. The effectiveness of existing law and the necessity for new law in dealing with a problem identified by Congress as a problem appropriate for solution by Congress is a matter committed to legislative judgement. *Hodel,* 452 U.S. at 283, 101 S.Ct. at 2363; *see McCulloch v. Maryland,* 1819, 17 U.S. (4 Wheat.) 316, 423, 4 L.Ed. 579. Once we find a reasonable relation between the means selected and the end desired, our analysis is concluded.

[8, 9] Second, the appellants argue that Congress should face a heavier burden of persuasion in justifying an exercise of the commerce power if the effect of the congressional action is complete preemption of an area of state law. We reject this argument for two reasons. First, it lacks any precedential basis: The Supreme Court has applied the standard commerce clause analysis to determine the validity of preemptive statutes. *See*

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[19] The only activities that are beyond the reach of Congress are "'those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government'". *Katzenbach v. McClung,* 1964, 379 U.S. 294, 302, 85 S.Ct. 377, 382, 13 L.Ed.2d 290 (quoting *Gibbons v. Ogden,* 1824, 22 U.S. (9 Wheat.) 1, 195, 6 L.Ed. 23).

FERC v. Mississippi, 1982, 456 U.S. 742, 754, 102 S.Ct. 2126, 2134, 72 L.Ed.2d 532. Second, concerns for state sovereignty are already served by the clear-statement rule of statutory construction that applies to preemptive statutes. Under this rule, federal law will not be held to preempt state regulation of an activity historically regulated by the states, unless statutory language or legislative history constitutes a clear direction that Congress intended to exercise its commerce power in full. *See supra* slip op. pages 3330-3331 at ____-____. The clear-statement doctrine prevents Congress from using ambiguous statutory intent to conceal its failure to accommodate the competing interests bearing on the federal-state balance of power; the doctrine thus increases the likelihood that Congress will give full attention to the interests of the states when it considers preemptive legislation. *See United States v. Bass*, 1971, 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488; L. Tribe, *American Constitutional Law* § 5-8, at 244 (1978); *id.* § 5-20, at 304.

Third, the appellants assert that the commerce power is less extensive when Congress is engaging in economic regulation than it is when Congress is acting to protect individual rights. They argue that the "rational basis" test of *Heart of Atlanta Motel* and *Katzenbach v. McClung* should be limited to the context of statutes involving the protection of individual civil rights. This argument lacks both supporting authority and merit.

[10-14] Because there are no cases directly supporting the appellants' position, the appellants argue by analogy from cases holding that *state* governments are less restricted by the commerce clause when they legislate against racial discrimination than they are when they legislate in the realm of economic regulation. *See Colorado Anti-Discrimination Commission v. Continental Air Lines*, 1963, 372 U.S. 714, 721-22, 83 S.Ct. 1022, 1025-26, 10 L.Ed.2d 84; *Bob-Lo Excursion Co. v. Michigan*, 1948, 333 U.S. 28, 34-40, 68 S.Ct. 358, 361-364, 92 L.Ed. 455. These decisions are inapposite, for they deal with the validity of state regulations that incidentally burden interstate commerce. In analyzing the validity of such state laws, the Supreme Court has formulated a balancing test in which the laws will be upheld "unless the burden on [inter-

state] commerce is clearly excessive *in relation to the putative local benefits". Pike v. Bruce Church, Inc.,* 1970, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (emphasis added). Accordingly, in such cases the power of a state government will vary direclty with the importance of the local interest served by the legislation in question. The situation presented by a congressional statute enacted under the commerce clause is completely different. In such instances, Congress exercises a power that "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution". *Gibbons v. Ogden,* 1824, 22 U.S. (9 Wheat.) 1, 196, 6 L.Ed. 23. Because of the plenary nature of the commerce power and because of the primacy accorded federal law by the supremacy clause,[20] the balance of interests between the federal and state governments is an inappropriate consideration in determining whether a federal act is a valid exercise of the commerce power.[21] *See Fidelity Federal Savings*

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[20] U.S. Const. Art. VI, cl.2.

[21] The appellants assert that the courts have used a balancing test to decide whether a statute that preempts state law is a valid exercise of the commerce power. They misread the cases. As support for their argument, the appellants cite *California v. Zook,* 1949, 336 U.S. 725, 69 S.Ct. 841, 93 L.Ed. 1005; *Peel v. Florida Dep't of Transp.,* 5 Cir.1979, 600 F.2d 1070; and *Scott v. City of Anniston,* 5 Cir.1979, 597 F.2d 897, *cert. denied,* 1980, 446 U.S. 917, 100 S.Ct. 1850, 64 L.Ed.2d 271. In *California v. Zook,* the Supreme Court weighed the national interest in uniform regulation against the states' interest in independent state regulation to determine whether Congress *intended* to preempt state law, not whether Congress *could* preempt state law. *See* 336 U.S. at 733-38, 69 S.Ct. at 845-48. In both *Peel* and *Scott,* the balancing of state and federal interests was part of the Courts' efforts to analyze whether the federal statutes violated the tenth amendment, *see Peel,* 600 F.2d at 1083; *Scott,* 597 F.2d at 900; the Courts were not seeking to determine whether the commerce clause *empowered* Congress to enact the statutes in question.

The validity of a preemptive statute is judged against the same "rational basis"/"reasonable relation" test that applies to other types of action under the commerce power. *See FERC v. Mississippi,* 1982, 456 U.S. 742, 754, 102 S.Ct. 2126, 2134, 72 L.Ed.2d 532; *National League of Cities v. Usery,* 1976, 426 U.S. 833, 840, 96 S.Ct. 2465, 2469, 49 L.Ed.2d 245. As the Supreme Court stated 43 years ago, "[t]he power of Congress over interstate commerce . . . can neither be enlarged nor diminished by the exercise or non-exercise of state power". *United States v. Darby,* 1941, 312 U.S. 100, 114, 61 S.Ct. 451, 457, 85 L.Ed. 609; *see also Hodel v. Virginia Surface Mining & Reclamation Ass'n* 1981, 452 U.S. 264, 290, 101 S.Ct. 2352, 2367, 69 L.Ed.2d 1; *Cloverleaf Butter Co. v. Patterson,* 1942, 315 U.S. 148, 154, 62 S.Ct. 491, 495, 86 L.Ed. 754.

& Loan Association v. de la Cuesta, 1982, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664; *Free v. Bland,* 1962, 369 U.S. 663, 666, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180; *United States v. Rock Royal Co-op.,* 1939, 307 U.S. 533, 569, 59 S.Ct. 993, 1011, 83 L.Ed. 1446; *Shreveport Rate Case,* 234 U.S. at 350, 34 S.Ct. at 835. If an activity affects interstate commerce substantially, the power of Congress to regulate that activity is not affected by whether Congress is engaging in economic regulation or seeking to protect civil rights.

A fundamental defect in the appellants' argument is that there are a number of Supreme Court decisions applying the traditional commerce clause analysis to instances of economic regulation. *See, e.g., FERC v. Mississippi,* 1982, 456 U.S. 742, 754, 102 S.Ct. 2126, 2134, 72 L.Ed.2d 532; *Hodel v. Indiana,* 1981, 452 U.S. 314, 323-24, 101 S.Ct. 2376, 2382-83, 69 L.Ed.2d 40; *National League of Cities v. Usery,* 1976, 426 U.S. 833, 840, 96 S.Ct. 2465, 2469, 49 L.Ed.2d 245.[22] There is also language in *Heart of Atlanta Motel* repudiating the notion that congressional power under the commerce clause varies with the purpose of the legislation. Referring to decisions upholding congressional uses of the commerce power, the Court said: "That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid." 379 U.S. at 257, 85 S.Ct. at 357. If the Supreme Court has erred in applying standard commerce clause reasoning to statutes dealing with economic regulation, then it is for the Supreme Court, not the Fifth Circuit Court of Appeals, to correct that error.

In summary, we are unwilling to hold that the usual scope of the commerce power does not apply to federal legislation that addresses intrastate activity, preempts state law, or concerns economic regulation. We decline to create a hierarchy of powers *within* the scope of the commerce clause; we decline to create *internal* doctrinal limitations on congressional use of the commerce power. We adhere to the traditional notion of the com-

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[22] The standard analysis derives from Chief Justice Marshall's opinion in *McCulloch v. Maryland,* 1819, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579; *see* L. Tribe, *American Constitutional Law* § 5-3, at 230 (1978). That case, of course, did not involve civil rights legislation.

merce clause as a source of plenary authority, a power that knows no internal doctrinal limitations other than the requirement of a substantial effect upon interstate commerce. Any more significant judicial constraint upon that power must derive from some other provision of the Constitution:

> "[I]f meaningful judicial limits on congressional power are to be devised to backstop legislative processes, it is not clear that the commerce clause provides an appropriate doctrinal context. To the extent that doctrine shapes the Supreme Court's perceptions, it is unlikely that congressional abuse of the commerce power could reliably be 'seen' from the commerce clause perspective, given the multiple rationality standards of contemporary commerce clause doctrine. A more appropriate doctrinal form is suggested by the paradigm of the Bill of Rights, the source of those judicial limitations that are currently most often enforced. Instead of attempting to fence Congress *in*—in the pre-1937 manner but with a little more running room—courts would do better to protect the values threatened by congressional abuse of the commerce power by fencing Congress *out*—denying the validity of particular congressional acts without altering the general shape of commerce clause doctrine."

L. Tribe, *American Constitutional Law* § 5-7, at 240-41 n. 2 (1978).

Having found section 214 of the Staggers Act to be a valid exercise of power under the commerce clause, we now examine whether the Act is invalid because of any "external" constraints upon commerce clause legislation.

B.

[15] The tenth amendment[23] is the primary focus of the appellants' appeal. Drawing upon the Supreme Court's decision

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[23] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

in *National League of Cities v. Usery,* 1976, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245, the appellants argue that section 214 of the Staggers Act is an unconstitutional instrusion upon the sovereignty of the states. We disagree.

In *National League of Cities,* the Supreme Court decided that congressional application of the minimum wage and overtime provisions of the Fair Labor Standards Act to state and local government employees violated constitutional rights of state sovereignty. Until that case, the tenth amendment was understood by constitutional scholars as simply a confirmation of the original understanding that powers not granted to the United States were reserved to the states or to the people. "It added nothing to the instrument as originally ratified. . . ." *United States v. Sprague,* 1931, 282 U.S. 716, 733, 51 S.Ct. 220, 222, 75 L.Ed. 640. "The amendment states but a truism that all is retained which is not surrendered." *United States v. Darby,* 1941, 312 U.S. 100, 114, 61 S.Ct. 451, 457, 85 L.Ed. 609. In *McCulloch v. Maryland,* 1819, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579, counsel for the State of Maryland relied on the tenth amendment in arguing that the power to create corporations was reserved to the states by that amendment. Chief Justice Marshall rejected the argument, pointing out that the tenth amendment, unlike the corresponding provision in the Articles of Confederation, omitted the word "expressly" as a qualification of granted powers. 17 U.S. (4 Wheat.) at 406-07, 4 L.Ed. 579. The refusal of both houses of the first Congress to insert in the amendment the word "expressly" before the word "delegated" indicates that the provision was not conceived to be a yardstick for measuring the power granted to the federal government or reserved to the states. 1 *Annals of Cong.* 767-68 (1789); 2 B. Schwartz, *The Bill of Rights: A Documentary History* 1150-51 (1971). Madison confirmed this view in the course of the debate (which took place while the proposed amendment was pending) concerning Hamilton's plan to establish a national bank: "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the constitutions of the States." 2 *Annals of Cong.* 1897 (1791). Thus, "[f]rom the beginning and for many years the amendment has been construed as not depriving the national

government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *United States v. Darby,* 312 U.S. at 124, 61 S.Ct. at 462.

[16] Be that as it may, the Supreme Court has not extended the unorthodox view of the tenth amendment expressed in *National League of Cities.* As the Court held in *EEOC v. Wyoming,* 1983, 460 U.S. ——, 103 S.Ct. 1054, 1061, 75 L.Ed.2d 18, before congressional legislation enacted under the commerce power can be held an unconstitutional intrusion on state sovereignty, the legislation must satisfy each part of a three-part test. First, the statute must regulate the "States as States", *National League of Cities,* 426 U.S. at 854, 96 S.Ct. at 2475; second, the statute must address matters that are indisputably "attribute[s] of state sovereignty", *id.* at 845, 96 S.Ct. at 2471; and third, it must be apparent that state compliance with the federal statute would directly impair the states' ability "to structure integral operations in areas of traditional governmental functions," *id.* at 852, 96 S.Ct. at 2474. *See also FERC v. Mississippi,* 1982, 456 U.S. 742, 764 n. 28, 102 S.Ct. 2126, 2139 n. 28, 72 L.Ed.2d 532; *United Transportation Union v. Long Island Railroad,* 1982, 455 U.S. 678, 684, 102 S.Ct. 1349, 1353, 71 L.Ed.2d 547; *Hodel v. Virginia Surface Mining & Reclamation Association,* 1981, 452 U.S. 264, 287-88, 101 S.Ct. 2352, 2365-66, 69 L.Ed.2d 1. Even if these three requirements are met, the federal statute will be upheld if the federal interest served is so compelling as to justify state submission. *EEOC v. Wyoming,* 103 S.Ct. at 1061; *United Transportation Union v. Long Island Railroad,* 455 U.S. at 684 n. 9, 102 S.Ct. at 1353 n. 9; *Hodel,* 452 U.S. at 288 n. 29, 101 S.Ct. at 2366 n. 29.

Section 214 of the Staggers Act does not affirmatively compel the states to administer federal policy. We conclude, therefore, that it does not regulate the states as states. The appellants' tenth amendment argument thus does not meet the first part of the three-part test.

[17, 18] The appellants contend that section 214 does regulate the states as states because it attempts to control the way the states regulate intrastate railroad rates. They say that the section gives the ICC direct control over state standards and

procedures, in effect regulating the states in their traditional role of governing their internal economics. This characterization of section 214 is misleading. The more correct view is that section 214 preempts state law governing an activity that affects interstate commerce, but gives the states the option either to continue regulation in compliance with federal law or to cease independent regulation altogether. Because the states have this option, because there is no affirmative coercion of the states by the federal government, the Act does not implicate the two principal concerns underlying tenth amendment jurisprudence: political accountability and separation of powers.

Until recently, it was well accepted that the representation of state interests in Congress by representatives elected from the states, coupled with the political accountability of Congress for federal legislation, furnished inherent political protection of the states' claim to the measure of sovereignty accorded them in the Constitution. The political process could be counted on to produce fair compromises between the federal and state governments. The judiciary, therefore, should adopt a position of extreme deference to congressional judgments concerning the allocation of power between those two levels of government. The classic exposition of this theory is that developed in Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,* 54 Colum.L.Rev. 543 (1954). *See also, e.g., National League of Cities,* 426 U.S. at 857, 876-77, 96 S.Ct. at 2476, 2486-87 (Brennan, J., dissenting); *Helvering v. Gerhardt,* 1938, 304 U.S. 405, 416, 58 S.Ct. 969, 973, 82 L.Ed. 1427; *Gibbons v. Ogden,* 1824, 22 U.S. (9 Wheat.) 1, 197, 6 L.Ed. 23; *The Federalist* No. 46, at 316-19 (J. Madison) (J. Cooke ed. 1961); Bogen, *The Hunting of the Shark: An Inquiry Into the Limits of Congressional Power Under the Commerce Clause,* 8 Wake Forest L.Rev. 187, 197-98 (1972); Choper, *On the Warren Court and Judicial Review,* 17 Cath.U.L.Rev. 20, 38-41 (1967); La Pierre, *The Political Safeguards of Federalism Redux; Intergovernmental Immunity and the States as Agents of the Nation,* 60 Wash.U.L.Q. 779, 787, 987 (1982).

The Supreme Court departed from this long-held political philosophy in *National League of Cities.* See especially 426 U.S. at 841 n. 12, 96 S.Ct. at 2469 n. 12. Some commentators agree

with that departure. *See The Supreme Court, 1982 Term,* 97 Harv.L.Rev. 70, 207 n. 70 (1983), and the authorities there cited. When Congress compels state governments to carry out federal policy, it evades responsibility for the resulting regulation and thereby circumvents the political check on infringements of state sovereignty:

> Local citizens hold [state agencies] accountable for the choices they make. . . . Congressional compulsion of state agencies . . . blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs. . . . [N]ational officials tend to force state governments to administer unpopular programs, thus transferring political liability for those programs to the States.

FERC v. Mississippi, 1982, 456 U.S. 742, 787 & n. 19, 102 S.Ct. 2126, 2135 & n. 19, 72 L.Ed.2d 532 (O'Connor, J., dissenting): *accord* La Pierre, *supra,* at 988-89, 991; Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy,* 86 Yale L.J. 1196, 1143-44 (1977); *The Supreme Court, 1981 Term,* 96 Harv.L.Rev. 62, 191, 196.[24] Thus, when state agencies are compelled to regulate in accordance with federal law, it is inappropriate for the courts simply to rely on the political process, in effect abdicating their powers to Congress.

Conversely, the political accountability of Congress remains intact in the absence of direct congressional coercion of state

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[24] *See also The Supreme Court, 1981 Term,* 96 Harv.L.Rev. 62 (1983):

> "Acts like [the one at issue in *FERC*] may bypass constitutional requirements for proper federal lawmaking and expand federal regulatory influence beyond the range contemplated by the Constitution. These types of compromise acts enable Congress to advance federal policy through state institutions when a lack of majority support for substantive national legislation might otherwise prevent federal regulation. . . . It is questionable that the Constitution empowers Congress to compel state regulation of interstate commerce in precisely those situations in which Congress cannot agree on the virtue of a national regulatory plan."

Id. at 190-91 (footnote omitted).

action. If Congress enforces federal policy through its own agencies, the electorate will hold Congress responsible for that policy. Congressional preemption of state regulation therefore does not implicate concerns of political accountability. *See FERC*, 456 U.S. at 787, 102 S.Ct. at 2152 (O'Connor, J., dissenting); La Pierre, *supra*, at 990-98. The same is true when, as with section 214 of the Staggers Act, a federal statute offers states a choice between regulating in accordance with federal law and ceasing regulation. If the state chooses to cease regulation, the ensuing regulatory regime will be federally administered and therefore attributed to the federal government; if the state opts for administering the federal policy, it is appropriate for the state to be held at least partly responsible for that policy. Thus, federal legislation such as section 214 of the Staggers Act does not trigger the concern for political accountability that justifies judicial scrutiny of statutes that compel that states to carry out federal policy.

[19, 20] That the nature of the Staggers Act is such that the Act does not undermine congressional political accountability, however, is not alone sufficient to insulate the Act from an attack based upon the tenth amendment. The role of the states in our federal form of government is a vital component of the Constitution's overall scheme of separation of powers, a scheme designed to protect individual liberty by preventing excessive concentration of power in any one governmental organ. *See San Diego Building Trades Council v. Garmon*, 1959, 359 U.S. 236, 243, 79 S.Ct. 773, 778, 3 L.Ed.2d 775; *The Federalist* No. 46 at 321-22 (J. Madison) (J. Cooke ed. 1961); *id.* No. 51, at 351-53. Regardless whether Congress acts in a politically accountable manner, the courts must be prepared to intervene to protect the essential role of the states in the federal system:

> "The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system. . . . The Constitution was designed to keep the balance between the States and the nation outside the field of legislative controversy."

New York v. United States, 1946, 326 U.S. 572, 594, 66 S.Ct.

310, 320, 90 L.Ed. 326 (Douglas, J., dissenting). Even though there are political safeguards protecting the independence of the executive branch of the national government,[25] the courts have not abdicated to congressional judgments concerning the distribution of power between the Executive and Congress when the courts perceived a threat to the separation of powers at the national level. *See INS v. Chadha,* 1983, ——U.S. ——, ———-———, ———-———, 103 S.Ct. 2764, 2782-83, 2788-89, 77 L.Ed.2d 317, 342-43, 349-50. The courts should likewise not abdicate to Congress when it allocates power between the national and state levels of government, if that allocation threatens the separation of powers inherent in the federal design.

[21] The source of judicially enforceable rights of state sovereignty is not so much the text of the tenth amendment[26] as it is the structural assumption of the Constitution as a whole that the states will remain separate and meaningful decision-making, functioning governmental entities.[27] *See* C. Black, *Perspectives in Constitutional Law* 40 (1963); L. Tribe, *American Constitutional Law* § 5-7, at 241 (1978); *id.* § 5-22, at 310. The

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[25] Notably, the presentment clause, U.S. Const. art. I, sec. 7, cls. 2-3, the President's veto power, *id.*, and the Vice-President's position as president of the Senate, *id.* sec. 3, cl. 4.

[26] *See EEOC v. Wyoming,* 103 S.Ct. at 1067 (Stevens, J., concurring): "Neither the Tenth Amendment, nor any other provision of the Constitution, affords any support for [*National League of Cities*] judicially constructed limitation on the scope of the federal power granted to Congress by the Commerce Clause." (footnotes omitted).

[27] Professor Black has criticized the courts for relying too often on textual analysis. He suggests that it would often be preferable to infer constitutional rights "from the structures and relationships created by the Constitution in all its parts or in some principal part". C. Black, *Structure and Relationship in Constitutional Law* 7 (1969). There is a large measure of legal pragmatism in his contention, but is persuasiveness should not lead a court to disregard its obligation to examine the text and the legislative history of constitutional and statutory provisions at issue in a case. Justice Rehnquist's opinion in *National League of Cities* can be read for the view that the tenth amendment is an "express [textual] declaration" of the limits on the power of Congress to override state sovereignty, but that the limits themselves derive from the "essential [structural] role of the States in our federal system of government", 426 U.S. at 844, 96 S.Ct. at 2470. There is a structural basis for the decision, therefore, that could be at odds with an historical and textual analysis of the tenth amendment.

Supreme Court has affirmed the concept of federalism as a structural assumption of the Constitution on a number of occasions:

> "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

Texas v. White, 1869, 74 U.S. (7 Wall.) 700, 725, 19 L.Ed. 227.

> "[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. . . . [I]n many articles of the Constitution the necessary existence of the States and, within their proper spheres, the independent authority of the States, is distinctly recognized."

Lane County v. Oregon, 1869, 74 U.S. (7 Wall.) 71, 76, 19 L.Ed. 101; *see also Helvering v. Gerhardt,* 1938, 304 U.S. 405, 414-15, 58 S.Ct. 969, 972-73, 82 L.Ed. 1427.

[22-26] Federal commerce power legislation that treats the states in a manner inconsistent with this constitutional assumption is therefore constitutionally suspect. Congress may not act in such a manner as to impair "the States' integrity or their ability to function effectively in a federal system". *Fry v. United States,* 1975, 421 U.S. 542, 547 n. 7, 95 S.Ct. 1792, 1795 n. 7, 44 L.Ed.2d 363; *see also United Transportation Union v. Long Island Railroad,* 1982, 455 U.S. 678, 686-87, 102 S.Ct. 1349, 1354-55, 71 L.Ed.2d 547.[28] Acts that regulate the "states

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[28] The Supreme Court has expressed similar concerns and reached similar conclusions in its decisions dealing with the doctrine of intergovernmental tax immunity. *See New York v. United States,* 1946, 326 U.S. 572, 575, 582, 66 S.Ct. 310, 311, 314, 90 L.Ed. 326 (opinion of Frankfurter, J.); *id.* at 587-88 (Stone, C.J., concurring); *Metcalf v. Mitchell,* 1926, 269 U.S. 514, 521, 523, 46 S.Ct. 172, 173, 174, 70 L.Ed. 384. In *United States v. California,* 1936 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567, the Court expressed the view that the tax immunity decisions were not analogous to situations involving the issue

as states" are inconsistent with the constitutional assumption of federalism, because such acts force the states to administer congressional policy judgments. In effect, such acts convert state agencies into tools of federal policy, and thereby threaten the independence of the states.[29] The suspect characteristic of such acts, then, is that the states are *compelled* to carry out federal policy. *See National League of Cities*, 426 U.S. at 852, 855, 96 S.Ct. at 2474, 2476; *The Supreme Court, 1981 Term*, 96 Harv.L.Rev. 62, 195; Note, *Hodel v. Virginia Surface Mining Reclamation Association and Hodel v. Indiana*, 10 Ecology L.Q. 69, 76.

[27, 28] In the absence of compulsion, however, congressional legislation that displaces state law does not endanger the separation of powers promoted by the federal system of government.[30] Accordingly, the Supreme Court has often affirmed the

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of state-sovereignty constraints on the commerce power. *See id.* at 184-85, 56 S.Ct. at 424-25. This view was repudiated in *National League of Cities*. *See* 426 U.S. at 854-55, 96 S.Ct. at 2475-76.

[29] Of course, such acts do not violate constitutional rights of state sovereignty if the acts are minimally intrusive. To be invalid under the doctrine of *National League of Cities*, a statute that regulates the states as states must also address matters that are indisputably attributes of state sovereignty, and it must be apparent that the states' compliance with the statute would directly impair their ability to structure integral operations in areas of traditional governmental functions. *See, e.g., EEOC v. Wyoming*, 103 S.Ct. at 1061.

[30] The appellants argue that, if the only limitation on congressional power to preempt state law is the requirement that the regulated activity substantially affect interstate commerce, then Congress effectively has the power to preempt virtually all of state law. It is possible that widespread abuse of the power to preempt could leave state sovereignty superficially intact but in reality nothing more than a "gutted shell", L. Tribe, *American Constitutional Law* § 5-20, at 302 (1978). Individual Justices of the Supreme Court, as well as the Court itself, have noted that constitutional problems might arise if Congress attempted to preempt large areas of state law. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 1981, 452 U.S. 264, 309-13, 101 S.Ct. 2352, 2390-2393, 69 L.Ed.2d 1 (Rhenquist, J., concurring in the judgment); *Griffin v. Breckenridge*, 1971, 403, U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338; *Perez v. United States*, 1971, 402 U.S. 146, 157-58, 91 S.Ct. 1357, 1362-63, 28 L.Ed.2d 686 (Stewart, J., dissenting); *NLRB v. Jones & Laughlin Steel Corp.*, 1937, 301 U.S. 1, 30, 37, 57 S.Ct. 615, 621, 624, 81 L.Ed. 893.

We need not address such ominous possibilities in this case. As Justice Frankfurter has noted,

principle that the tenth amendment does not limit congressional power to preempt state law regulating private activity.[31] *See EEOC v. Wyoming,* 1983, 460 U.S. ——, 103 S.Ct. 1054, 1061 & n. 10, 75 L.Ed.2d 18; *FERC v. Mississippi,* 1982, 456 U.S. 742, 759, 102 S.Ct. 2126, 2137, 72 L.Ed.2d 532; *Hodel v. Virginia Surface Mining & Reclamation Association,* 1981, 452 U.S. 264, 286, 289-91, 101 S.Ct. 2352, 2365, 2366-68, 69 L.Ed.2d 1; *see also Vehicle Equipment Safety Commission v. National Highway Traffic Safety Administration,* 4 Cir.1979, 611 F.2d 53, 54-55; *City of New York v. United States Department of Transportation,* S.D.N.Y.1982, 539 F.Supp. 1237, 1253, *rev'd on other grounds,* 2 Cir.1983, 715 F.2d 732; La Pierre, *supra,* at 796 n. 55. Federal legislation that preempts state regulation of private activity does not regulate the states as states. *Hodel,* 452 U.S. at 288, 101 S.Ct. at 2366.

[29-32] As we have noted above, the Staggers Act is in essence a preemptive statute. The federal policy of deregulating railroad rates is imposed regardless of the states' actions.[32] If

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> "The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrine sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court."

New York v. United States, 1946, 326 U.S. 572, 583, 66 S.Ct. 310, 314, 90 L.Ed. 326.

[31] Even the Court's staunchest defenders of state sovereignty have acknowledged this principle. *See FERC,* 456 U.S. at 775 n. 1, 787, 102 S.Ct. at 2146 n. 1, 2152 (O'Connor, J., dissenting); *National League of Cities,* 426 U.S. at 844-45, 96 S.Ct. at 2470-71 (majority opinion of Rehnquist, J.); *Fry v. United States,* 1975, 421 U.S. 542, 552, 95 S.Ct. 1972, 1798, 44 L.Ed.2d 363 (Rehnquist, J., dissenting); *Bethlehem Steel Co. v. New York State Labor Relations Bd.,* 1947, 330 U.S. 767, 780, 67 S.Ct. 1026, 1033, 91 L.Ed. 1234 (separate opinion of Frankfurter, J.)

[32] This result is constitutionally permissible, of course, because of the supremacy clause. Constitutional rights of state sovereignty are not implicated simply because the states cannot *prevent* the carrying out of federal policy. The Constitution's protection of state sovereignty is concerned with the manner in which the federal government treats the states and with the effect that this treatment has upon the state governments; it is not concerned with the *substantive* effect of federal law.

a state wishes to continue to regulate the intrastate rates of interstate railroads, it must do so in accordance with federal standards and procedures. But the Act does not *compel* the states to administer federal law; any state may choose not to regulate. Therefore, the Act does not regulate the states as states.[33] The Supreme Court adopted similar reasoning in *FERC* and *Hodel,* each of which involved a statute similar in nature to section 214 of the Staggers Act. In *Hodel* the Court held:

> "Thus, Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining. We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role."

452 U.S. at 290, 101 S.Ct. at 2367. And in *FERC* the Court stated:

> ". . . Congress could have pre-empted the field, at least insofar as private rather than state activity is concerned; PURPA [the statute in question] should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they consider the suggested federal standards. . . . There is nothing in PURPA 'directly compelling' the States to enact a legislative program. In short, because the two challenged Titles simply condition continued state involvement in a preemptible area on the consideration of federal proposals, they do not threaten the States' 'separate and independent existence,' and do not impair the ability of the States 'to function effectively in a federal system.'"

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[33] *Accord Montana ex rel. Montana Dep't of Agriculture v. United States,* D.Mont. Sept. 9, 1983, slip op. at 4-5 (No. CV-81-29-GF), *appeal filed,* 9 Cir. Oct. 25, 1983 (No. 83-4246).

456 U.S. at 765-66, 102 S.Ct. at 2140-41 (citations and footnotes omitted; emphasis omitted).

Because the Staggers Act does not regulate the states as states, it does not offend *National League of Cities*.

C.

[33-36] The appellants argue that, because section 214 of the Staggers Act transfers authority from elected state officials to non-elected federal officials, it undermines the self-government of the states. The appellants assert that section 214 therefore violates the Constitution's guarantee of a republican form of government for each state.[34] We reject the argument.[35]

The appellants' argument is highly imaginative. It is also illimitable: If sustained, it would enable the states to destroy the ability of Congress to preempt state law. We have cited numerous cases recognizing that the only restraint on congressional preemptive power is the requirement that the regulated activity substantially affect interstate commerce. We cannot accept that the guaranty clause has either the meaning or the effect ascribed to it by the appellants. The Staggers Act does not violate the Constitution's guarantee of a republican form of government for each state.

D.

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[34] "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. Const. art. IV, sec. 4.

[35] The appellants did not raise this argument before the district court. As a general rule, we will not consider an issue raised for the first time on appeal. *United States v. Parker*, 5 Cir. 1983, 722 F.2d 179, 183 n. 2; *Hudspeth v. United States*, 5 Cir.1975, 519 F.2d 1055, 1056 n. 1. The decision whether to apply the general rule is, however, within our discretion, and it is a matter to be determined on a case-by-case basis. *Singleton v. Wulff*, 1976, 428 U.S. 106, 121, 96 S.Ct. 2858, 2877, 49 L.Ed.2d 826. It may be appropriate to address the issue if it concerns a pure question of law, *see, e.g., In re Johnson*, 5 Cir.1984, 724 F.2d 1138, 1140, or if the proper resolution of the issue is beyond doubt, *see Singleton v. Wulff*, 428 U.S. at 121, 96 S.Ct. at 2877. Both of these conditions are present with regard to the appellants' guaranty clause argument. We therefore see no reason not to address the argument.

[37, 38] The appellants argued before the district court that sections 201 through 203 of the Staggers Act would allow some railroads to charge monopoly rates, and therefore that the Act violated the fifth amendment by effecting an unconstitutional taking of property without just compensation. They contend on appeal that this argument presents genuine issues of material fact. They conclude, therefore, that the district court erred by granting summary judgment in favor of the defendants. The appellants are wrong.

Because the appellants' argument arises in the context of a facial attack upon the Staggers Act, it presents no concrete controversy concerning the application of the Act to particular persons or operations. *See Hodel v. Virginia Surface Mining & Reclamation Association,* 1981, 452 U.S. 264, 295, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1. The only question properly before the district court and, in turn, this Court, is whether the "mere enactment" of the Act constitutes a taking. *Id.; Agins v. City of Tiburon,* 1980, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106.

The mere enactment of a statute does not effect a taking of property if the statute advances legitimate governmental interests and if it does not deny a property owner economically viable use of his property. *Tiburon,* 447 U.S. at 260-63, 100 S.Ct. at 2141-43. That the Staggers Act advances legitimate governmental interests is undeniable. The appellants have made no allegations establishing as a genuine factual issue that the mere enactment of the Staggers Act denied them, or anyone, for that matter, economically viable use of their property. The district court's grant of summary judgment was proper.[36]

IV.

The appellants challenge the constitutionality of section 201, 202, 203, and 214 of the Staggers Act on four separate grounds.

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[36] In *Montana ex rel. Montana Dep't of Agriculture v. United States,* D.Mont. Sept. 9, 1983 (No. CV-81-29-GF), *appeal filed,* 9 Cir. Oct. 25, 1983 (No. 83-4246), the district court considered a "taking" argument directed against the Staggers Act in a facial attack. Using reasoning similar to that in the text, the court held that the argument was not ripe. *Id.,* slip op. at 5.

We sustain the Act against all four attacks. The Act is a valid exercise of the commerce power. It does not violate the asserted constitutional rights of states. It does not abridge the guaranty clause. It does not effect a taking of property without just compensation. The challenged sections of the Act are facially constitutional.

We AFFIRM the judgment of the district court.

APPENDIX B

APPENDIX B

§ 11501.
INTERSTATE COMMERCE COMMISSION AUTHORITY OVER INTRASTATE TRANSPORTATION

(a) The Interstate Commerce Commission shall prescribe the rate, classification, rule, or practice for transportation or service provided by a carrier subject to the jurisdiction of the Commission under subchapter IV of chapter 105 of this title when the Commission finds that a rate, classification, rule, or practice of a State causes—

(1) between persons or localities in intrastate commerce and in interstate and foreign commerce, unreasonable discrimination against those persons or localities in interstate or foreign commerce; or

(2) unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce.

(b)(1) A State authority may only exercise jurisdiction over intrastate transportation provided by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title if such State authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle.

(2) Within 120 days after the effective date of the Staggers Rail Act of 1980, each State authority exercising jurisdiction over intrastate rates, classifications, rules, and practices for intrastate transportation described in paragraph (1) of this subsection shall submit to the Commission the standards and procedures (including timing requirements) used by such State authority in exercising such jurisdiction.

(3)(A) Within 90 days after receipt of the intrastate regulatory rate standards and procedures of a State authority under paragraph (2) of this subsection, the Commission shall certify such State authority for purposes of this subsection if the Com-

mission determines that such standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission under this title. If the Commission determines that such standards and procedures are not in such accordance, it shall deny certification to such State authority, and such State authority may resubmit new standards and procedures to the Commission for review in accordance with this subsection.

(B) The standards and procedures existing in each State on the effective date of the Staggers Rail Act of 1980 for the exercise of jurisdiction over intrastate rail rates, classifications, rules, and practices shall be deemed to be certified by the Commission from that date until the date an initial determination is made by the Commission under subparagraph (A) of this paragraph.

(4)(A) Any State authority which is certified by the Commission under this subsection may use its standards and procedures in exercising jurisdiction over intrastate rail rates, classifications, rules, and practices during the 5-year period commencing on the date of such certification. Any State authority which is denied certification or which does not seek certification may not exercise any jurisdiction over intrastate rates, classifications, rules, and practices until it receives certification under this subsection.

(B) Any intrastate transportation provided by a rail carrier in a State which may not exercise jurisdiction over an intrastate rate, classification, rule, or practice of that carrier due to a denial of certification under this subsection shall be deemed to be transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(5)(A) Certification of a State authority under this subsection is valid for the 5-year period beginning on the date of such certification. Prior to the expiration of such 5-year period, the State authority shall resubmit its intrastate regulatory standards procedures to the Commission for subsequent certification in accordance with this subsection.

(B) During any 5-year certification period, a State may not change its certified standards and procedures without notifying and receiving express approval from the Commission.

(6) Notwithstanding any other provision of this subtitle, a State authority may not exercise any jurisdiction over general rate increases under section 10706 of this title, inflation-based rate increases under section 10712 of this title, or fuel adjustment surcharges approved by the Commission.

(c) Any rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may petition the Commission to review the decision of any State authority, in any administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined, on the grounds that the standards and procedures applied by the State were not in accordance with the provisions of this subtitle. The Commission shall take final action on any such petition within 30 days after the date it is received. If the Commission determines that the standards and procedures were not in accordance with the provisions of this subtitle, its order shall determine and authorize the carrier to establish the appropriate rate, classification, rule, or practice.

(d)(1) The Commission has exclusive authority to prescribe an intrastate rate for transportation provided by a rail carrier subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title when—

> (A) a rail carrier files with an appropriate State authority a change in an intrastate rate, or a change in a classification, rule, or practice that has the effect of changing an intrastate rate, that adjusts the rate to the rate charged on similar traffic moving in interstate or foreign commerce; and
>
> (B) the State authority does not act finally on the change by the 120th day after it was filed.

(2) When a rail carrier files an application with the Commission under this subsection, the Commission shall prescribe

the intrastate rate under the standards of subsection (a) of this section and chapter 107 of this title. Notice of the application shall be served on the State authority.

(e)(1) The Commission shall prescribe any rate, rule, or practice applicable to transportation provided entirely in one State by a motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title—

> (A) if the carrier has requested the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice for permission to establish such rate, rule, or practice and the request has been denied (in whole or in part) or the State authority has not acted finally (in whole or in part) on the request by the 120th day after the carrier made the request; and
>
> (B) if the Commission finds that the rate, rule, or practice in effect and applicable to such intrastate transportation causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce.

(2) For purposes of paragraph (1)(B) of this subsection, there shall be a rebuttable presumption that—

> (A) any rate, rule, or practice applicable to transportation provided by a motor common carrier of passengers entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds—
>
> > (i) that such rate, rule, or practice results in the carrier charging a rate for such transportation which is lower than the rate such carrier charges for comparable interstate transportation of passengers;
> >
> > (ii) on the basis of evidence presented by the carrier, that as a result of such rate,

rule, or practice such carrier does not receive revenues from such transportation which exceed the variable costs of providing such transportation; or

(iii) that the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice failed to act finally (in whole or in part) on the request of the carrier to establish such rate, rule, or practice by the 120th day after the date the carrier made the request; and

(B) any rate applicable to transportation entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds that the most recent general rate increase applicable to transportation provided by motor common carriers of passengers in such State is less than the most recent general rate increase applicable to interstate transportation provided by motor common carriers of the passengers under this subtitle.

(3)(A) A motor common carrier of passengers must file an application with the Commission for prescription under this subsection of a rate, rule, or practice applicable to transportation provided entirely in one State by such carrier. When such application is filed with the Commission, the carrier shall certify that he has notified (i) the Governor of such State, (ii) the department, agency, or instrumentality of such State which denied, or failed to take action on, the request of such carrier related to such rate, rule, or practice, and (iii) such other interested persons as the Commission may specify by regulation. The Commission shall take final action on any such application not later than 60 days after such application is filed with the Commission.

(B) The Commission shall establish, by regulation, procedures for processing applications under this subsection.

(4) This subsection shall not apply to any carrier owned or controlled by a State or local government.

(5) No State or political subdivision thereof and no interstate agency of other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provisions having the force and effect of law relating to scheduling of interstate or intrastate transportation provided by motor common carrier of passengers subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title on an authorized interstate route or relating to the implementation of any reduction in the rates for such transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required. This paragraph shall not apply to intrastate commuter bus operations.

(6)(A) No motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission may charge or collect a rate for intrastate service provided on an authorized interstate route which constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this title.

(B) When the Commission decides, upon complaint by any person, that a reduction in a rate charged or collected by such a motor common carrier of passengers for intrastate service provided on an authorized interstate route constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this title, the Commission shall prescribe the rate applicable to such service.

(f) The Commission may take action (1) under this section only after a full hearing, or (2) with respect to a rate, rule, or practice of a motor common carrier of passengers, in accordance with the procedures established by the Commission under subsection (e)(3)(B) of this section. Action of the Commission under this section supersedes State law or action taken under State law in conflict with the action of the Commission.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1444; Pub.L. 96-448, Title II, § 214(a)-(c)(1), Oct. 14, 1980, 94 Stat. 1913; Pub.L. 97-261, § 17(a), Sept. 20, 1982, 96 Stat. 1117.

APPENDIX C

APPENDIX C

INTERSTATE COMMERCE COMMISSION
DECISION

Ex Parte No. 388 (Sub-No. 31)

STATE INTRASTATE RAIL RATE AUTHORITY—TEXAS

Decided: April 13, 1984

After a review of the standards and procedures of the State of Texas and of relevant comments, the Commission, pursuant to 49 U.S.C. 11501(b) denies the application of the State of Texas to exercise jurisdiction over intrastate railroad rates. Texas intrastate rates, classifications, rules, and practices for intrastate transportation are made subject to the Commission's jurisdiction in accordance with 49 U.S.C. 11501(b)(4)(B).

Jim Nugent, Mack Wallace, and *Buddy Temple,* for the Railroad Commission of Texas.

Robert B. Burns, Jr., Peter Lee, John P. Legendre, Hugh L. McCulley, Michael E. Roper, Donald Turkal, and *William J. Wochner* for Texas railroads.

Virgil O. Musick for the Texas Industrial Traffic League.

DECISION

BY THE COMMISSION:

We are denying Texas' application to be certified to regulate intrastate rates, classifications, rules and practices. At the

same time we are revoking the provisional certification that was granted to Texas while we evaluated its application for final certification. This action comes only after a protracted attempt to obtain Texas' compliance with the regulatory regime created by the Staggers Rail Act of 1980 (Staggers Act).

Our efforts have included numerous decisions advising all of the States of the standards they would have to meet to obtain certification, a large number of decisions reversing orders of the Railroad Commission of Texas (RCT) involving contracts and exemptions, and many staff discussions aimed at advising RCT in the development of standards to apply under the Staggers Act. All forms of persuasion have failed, and we are convinced that there is no prospect of RCT's voluntary compliance with the Staggers Act.

We wish to emphasize at the outset that there is a quantum difference between the resistance we have encountered in attempting to deal with RCT and the differences we have had with other States over the interpretation and implementation of the Staggers Act.

Below we explain the specific areas in which RCT deviates from the Federal regulatory standards governing intrastate rail transportation. Before addressing the specific standards, however, we wish to emphasize (both for RCT and for all other State authorities seeking final certification) the fundamental principles embodied in the Staggers Act reform of intrastate rail regulation.

The Interstate Commerce Commission is acting in this case under section 214 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1985 (Oct. 14, 1980) codified as 49 U.S.C. 11501(b)-(d). Section 214 made major changes in the relationship between State agencies and the Commission in regulating intrastate rail transportation.

Before the Staggers Act, the State regulatory bodies had initial responsibility for intrastate rail regulation, and the Commission could preempt a State's authority and prescribe an intrastate rate, after a hearing in only two situations: (1) when intrastate rate required by the State unjustly discriminated

against or imposed an undue burden on interstate commerce; or (2) when the State was dilatory in acting upon a proposed intrastate rate change. *See* section 13(4) of the former Interstate Commerce Act, recodified as 49 U.S.C. 11501 by the Act of October 7, 1978, Pub. L. No. 95-473, 94 at 1444. The Commission usually exercised its section 11501 powers when railroads sought relief after State agencies refused to authorize intrastate rate increases commensurate with Commission-approved interstate general increases.[1] In those cases, the Commission generally awarded relief from such intrastate rate holddowns.

In the Staggers Act, Congress adopted a new rail transportation policy aimed at eliminating burdensome government regulation and allowing rail carriers to earn adequate revenues, *as determined by the Interstate Commerce Commission* (emphasis added). 49 U.S.C. 10101a(a)(3). This new policy also requires the Commission "to assure that intrastate regulatory jurisdiction is exercised in accordance with the [federal] standards." 49 U.S.C. 10101a(a)(9). To implement this directive, Congress enacted section 214 of the Staggers Act "to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by State regulation of rates, practices, etc., which are not in accordance with these goals." H.R. Rep. No. 1430, 96th Cong., 2d Sess. 106 (1980).

Congress concluded that burdensome State regulatory policies had prevented intrastate traffic from paying its "fair proportionate share" of the cost of the national railroad system. The House Commerce Committee estimated, for example, that the nationwide disparity between intrastate and interstate rates cost rail carriers $400 million in 1977 alone. H.R. Rep. No. 1035, 96th Cong., 2d Sess. 61 (1980) ("House Report"). That disparity had two basic causes. First, the regulatory standards and procedures of the various States differed substantially from one another and from those of the Commission. See House

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[1] *See e.g., Montana Intrastate Freight Rates and Charges—1977,* 357 I.C.C. 281 (1978); *Montana Intrastate Rail Freight Rates and Charges,* 357 I.C.C. 207, 213 (1976); *West Virginia Intrastate Rates and Charges,* 355 I.C.C. 823 (1977).

Report at 128-30. As a result, the railroads often obtained a substantial increase in interstate rates from the Commission, only to have the same increase denied by State regulatory authorities on intrastate movements.

A second and more basic cause of the disparity was sheer regulatory delay. Even though the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4R Act) had required State agencies to act on rate matters within 120 days, State activities nevertheless resulted in revenue drains on the carriers, because even when the Commission eventually overturned a State decision holding down rates, the railroad still lost revenues from the time lag involved. *Id.* at 61.

Section 11501 as amended by the Staggers Act addressed the problem by reducing the jurisdiction and discretion of State regulatory bodies while increasing the Commission's role in intrastate regulation. The substantive law governing intrastate rail transportation was expressly federalized. As stated in section 11501(b)(1), "[a] State authority may *only* exercise jurisdiction over intrastate [rail] transportation . . . *if* such State authority exercises such jurisdiction *exclusively* in accordance with the provision of *this subtitle*." (emphasis added.) This substantive preemption of previous regulatory standards could not be clearer. The Conference Report on the Staggers Act (p. 106) affirmed that the "Act preempts State authority over rail rates, classifications, rules, and practices."

States are allowed a limited role under the new law, but as delegated administrators of the Interstate Commerce Act.[2] They may seek certification from the Commission. A State is to be certified "if the Commission determines that such [sub-

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[2] It is now settled that certified State authorities are bound by ICC regulations and case law, as well as the Federal statute itself. *Illinois Central Gulf R.R.* v. *ICC*, 702 F.2d 111 (7th Cir. 1983).

States are "not . . . free to exercise their judgment as to whether the Commission's standards have been satisfied." *Wheeling-Pittsburgh Steel Corp.* v. *ICC*, 723 F.2d 346, 354 (6th Cir. 1983).

Rather, a certified State authority is essentially a fact-finder, applying Federal decisional standards, subject to the "quasi-appellate" administrative review procedures of Section 11501(c).

mitted] standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission under this subtitle." 49 U.S.C. 11501(b)(3)(A). If, as we determine in this case, the State standards and procedures do not conform to Federal law, the Commission "*shall* deny certification to such State authority." Id. (emphasis added). It is this duty that we perform in our present decision. A State authority, when denied certification, "may not exercise *any* jurisdiction over intrastate rates, classifications, rules and practices." 49 U.S.C. 11501(b)(4)(A) (emphasis added). Instead, intrastate rail transportation within that State "shall be deemed to be transportation subject to the jurisdiction of the Commission." 49 U.S.C. 11501(b)(4)(B). Hence, as of the effective date of this decision, intrastate rail transportation in Texas shall be regulated only by this Commission and only under Federal standards embodied in our statute, regulations, and decisional case law.

Until and unless Texas reapplies and demonstrates its good faith intention to conform to Federal standards and procedures, it must be removed from any role in the regulation of intrastate rail transportation. This severe but necessary sanction was provided by Congress precisely to avoid State "undermin[ing]" of the basic goals of the Staggers Act. H. Conf. Rep. No. 96-1430, *supra*, at 106. This case provides a regrettable but vivid illustration of the congressional foresight embodied in the certification process.

HISTORY OF THIS PROCEEDING

In Ex Parte No. 388, *State Intrastate Rail Rate Authority—P.L. 96-448* (not printed), served February 8, 1982 (47 FR 5786, February 8, 1982) (*Intrastate Rail*), we extended provisional certification to 36 states, including Texas, to allow each State additional time to submit standards and procedures that would affirm the State's intention to exercise its jurisdiction over intrastate rail transportation in conformance with Federal standards.[3] The Railroad Commission of Texas (RCT or Texas)

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[3] Upon request, the time for compliance was extended twice, and revised standards were due March 14, 1983.

filed modified standards and procedures with comments and a request for clarification of *Intrastate Rail, supra.* It also filed a decision by the RCT involving the rejection of a contract tariff filing, and a petition for clarification and modification of the Commission's certification procedures. The major rail carriers operating in Texas[4] have filed two supplemental comments pointing out purported deficiencies in Texas' rules and procedures and challenging Texas' General Tariff Rules (published separately from the standards submitted to us).[5] Texas has not replied to the supplemental comments.

In *Intrastate Rail, supra,* we stated that, *at a minimum,* each State seeking certification must: (1) acknowledge that it has lost jurisdiction over general rate increases, inflation-based rate increases, and fuel adjustment surcharges; (2) assure us that it will not require prejustification of rate changes; and (3) explain all its standards and procedures in certain major areas and demonstrate in its submission that they comport with Federal law. The major areas listed were: timing of rate changes, adequate revenues, suspension, market dominance, general reasonableness standards, refunds, contract rates, discrimination, exemptions, transportation of recyclable materials, limited liability rates, and national transportation policy.[6] We emphasized that this was not a comprehensive list of subjects, but was intended to alert the States to general areas to be addressed, and we specifically stated that further review of the States' submissions might disclose other problems.

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[4] Burlington Northern Railroad Company, Kansas City Southern Railway Company, The Atchison, Topeka and Santa Fe Railway Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, and Missouri-Kansas-Texas Railroad Company.

[5] The General Tariff rules challenged in the Texas rail carriers' comments were current when the comments were filed. However, the RCT later revised the rules. The Texas rail carriers challenged the revised rules in a separate proceeding, No. 39631, *Petition for Review of a Decision of the Railroad Commission of Texas Under 49 U.S.C. 11501(c)* (not printed), served January 12, 1984. Texas replied, and the Texas Industrial Traffic League (TITL) filed a petition to intervene. The proceeding in No. 39631 was discontinued and all issues raised there are being handled in this proceeding. TITL's petition for intervention was granted, and it was made a party to this proceeding.

[6] These minimum guidelines were set forth in the appendix of the decision.

These guidelines applied to all the States, including Texas. In addition, we set forth other specific criticisms of Texas' standards and procedures. We pointed out that Texas' stand ards improperly: (1) provided for suspension on its own motion; (2) stated its jurisdiction is coextensive with ours; (3) improperly required an overbroad disclosure of contract terms; (4) permitted the finding of an unreasonable rate without regard to the jurisdictional threshold limitation or the market dominance requirements of 49 U.S.C. 10709; and (5) provided for a 90-day prohibition of the refiling of rates found unreasonable because of a railroad's default.

Texas' response to these general and specific concerns is deficient.[7] Its redress of the specific problems that we set forth is inadequate, and the response to most of the general subject areas we had outlined is seriously incomplete. In some instances, including jurisdictional policy, contracts, 90-day prohibition on refiling, and exemptions, the inadequacies persist, because Texas refuses to make the necessary changes, not because it misunderstands what is required. Texas has staunchly maintained that it need only comply with its interpretation of the Staggers Act and need not follow Federal law as expressed in this Commission's decision (rulemaking and adjudicatory). In the contract area in particular, Texas continues to maintain this despite many decisions by this Commission finding that Texas' rejections of contract tariffs violate Federal contract standards and procedures, despite the substantial affirmance of the Federal contract rules in *Water Transportation Ass'n.* v. *ICC* 722 F.2d 1025 (2nd Cir. 1983) (*Water Transport*), and despite two major court decisions that hold that the States must follow our decisions (rulemaking and adjudicatory) interpreting the Staggers Act, as well as the Act itself. *Wheeling-Pittsburgh Steel Corp.* v. *ICC*, 723 F.2d 346 (3rd Cir. 1983) (*Wheeling-Pittsburgh*); and *Illinois Central Gulf R.R. Co.* v. *ICC*, 702 F.2d 111 (7th Cir. 1983) (*Illinois Central Gulf*). Texas' refusal to comply with Federal law in the face of these decisions and the inade-

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[7] Although we complimented Texas' original submission in *Intrastate Rail, supra*, the compliment was as to form, not substance. We suggested that other States make Texas a prototype for the format of their standards, but we cautioned them *not* to copy Texas as to content.

quacy of its submission as a whole indicates that Texas is unwilling and unable to regulate intrastate rates in accordance with Federal law. Therefore, its request for certification must be denied.

Furthermore, in *Illinois Central Gulf R.R. Co.* v. *ICC*, 720 F.2d 958 (7th Cir. 1983), the court seemed to indicate that, although our initial grant of the States' provisional certification was appropriate (since we did not have sufficient information upon which to base a decision), where we have gathered sufficient information to make a decision to grant or deny certification, provisional certification is no longer justified. The court admonished us to take steps to expedite the certification process, and bring an end to provisional certification. Since the deficiencies of Texas' submission and its open refusal to regulate in accordance with Federal law despite of our continuing admonitions to change its conduct and our clearly stated warning that a failure to do so would be regarded as a factor strongly militating against certification provide us with ample evidence on which to base our decision to deny certification, Texas' provisional certification is no longer warranted and must be revoked. (This must be contrasted with the situation of other States that clearly have made *bona fide* efforts to comply with Federal law, but whose submissions require revisions clarifying their ability to comply.)

All Texas intrastate rail matters are subject to the jurisdiction of this Commission in accordance with 49 U.S.C. 11501(b)(4)(B) on the effective date of this decision. Procedures to assure continuity for cases pending before RCT are discussed later in this decision.

PRELIMINARY MATTERS

Texas has requested that we clarify and modify a number of the certification procedures. The matters that are the subject of its requests are abundantly clear already, and its arguments for modification lack merit. Nevertheless, we will briefly address its arguments.

A. *Notice and Opportunity to Be Heard.*—Texas maintains that our notice of the issues in the certification proceeding was

inadequate. It argues that our notice of the requirement that States follow the Commission rulemakings, including those involving contracts and exemptions, was insufficient to inform Texas that such decisions would be binding or to afford it sufficient opportunity to participate in such proceedings. It also questions whether decisions in other State certification proceedings [especially those in Ex Parte No. 388 (Sub-No. 7), involving Illinois] should be binding on Texas. Texas argues that no State should be bound by decisions in any rulemaking or adjudicatory proceeding unless the State has been given notice that those determinations may be binding, nor be bound in its own certification proceeding by determinations rendered in those involving another State's application. Texas requests modification of our procedures accordingly.

Texas received sufficient notice of the issues involved in the certification proceeding, of our contract and exemption requirements, and of the relevance of other State proceedings to its own. Modification of our procedures is unnecessary. Under *California Citizens Band Association* v. *United States*, 375 F.2d 43, 48 (9th Cir. 1967), a notice of proposed rulemaking is sufficient if it provides a description of the subject and issues involved in the rulemaking. The notice need only be descriptive enough so that the parties can meaningfully participate. It need not contain every precise proposal that the agency may ultimately adopt. *Ethyl Corp.* v. *Environmental Protection Agcy.*, 541 F.2d 1, 48 (D.C. Cir. 1976). Although our early decisions in Ex Parte No. 388 were general, they were sufficient to put the States on notice of the subjects and issues involved in the proceeding. The later decisions very explicitly explained our requirements, and the States have been given an opportunity to comply after each decision.

Our contract and exemption requirements were set out in two decisions, *State Intrastate Rail Rate Authority—P.L. 96-448*, 365 I.C.C. 855 (1982) [*Illinois I*], and *State Intrastate Rail Rate Authority—P.L. 96-448*, 367 I.C.C. 149 (1983) [*Illinois II*]. It was clear that the *Illinois* analysis was case law precedent that was to be followed by all the applicant States. We continually referred to the States as a group in relation to these requirements. In *Illinois II* we specifically stated that "other States" [other than Illinois] should rely upon our final contract

rules in making their submissions, and that once a particular category of traffic is exempted by the Commission, this becomes a standard from which "States" may not deviate, subject to a possible exception relating to unique circumstances. As we explained in No. 39627, *Petition under 49 U.S.C. 11501(c) by Missouri-Kansas-Texas Railroad Company, et al., for Review of an Order of the Railroad Commission of Texas* (not printed), served January 24, 1984, "once a Federal exemption is adopted, it applies automatically to intrastate commerce without need for individual State adoption." *See* also the further discussion and cases cited in No. 39627. In both *Illinois* decisions, we gave all States time to supplement their fillings to comply with the principles established there. Copies of the decisions were served on the Governors, public service commissions, and transportation committees in the legislatures of each State, and Texas was clearly aware of these decisions when it filed its clarification requests.

As previously stated, Texas argues that no State should be bound by decisions in any rulemaking or adjudicatory proceedings unless it has been given notice and an opportunity to participate in those proceedings. It further maintains that it had no notice that our rules and decisions (including those in other intrastate rate proceedings) would be binding on all the States, that it had no opportunity to participate in the proceedings in which the rules were adopted, and therefore that it should not be bound by them. This argument is without merit.

First, Texas clearly had notice that our rules and decisions would be binding upon the States. Under 49 U.S.C. 11501(b)(3)(A) a State may be certified if we determine that the State's "standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission under this Title." Federal "standards and procedures" are delineated by the Commission's decisions (rulemaking and adjudicatory) that implement the statute, as well as by the statute itself. It is clear from the phrasing of section 11501(b)(3)(A) that our decisions enunciating important Federal standards and procedures (particularly proceedings related to the areas set out in *Intrastate Rail, supra*) are binding on the States. *See Wheeling-Pittsburgh, supra,* and *Illinois*

Central Gulf, supra.[8] Thus, Texas was put on notice by the statute that decisions in these proceedings would be binding.

Moreover, notices of all our major rulemakings, including those involving contracts and various exemptions, were published in the *Federal Register*. Comments were requested, and any State, including Texas, was free to participate in these rulemaking proceedings.

In addition, Texas has had notice of and access to each decision served in every other State proceeding, since notice of these decisions were all published in the *Federal Register*. Although each State's proceeding is independent of the others, and the States' submissions need not be identical, we have been consistent and uniform concerning the basic terms required from State to State. Thus, a discussion of changes required to correct the standards of one State stands as notice to the remaining applicants of what is required. It is binding as case precedent. [While we usually prefer to develop rules of general applicability in rulemakings, and then apply those rules in specific adjudications, this Commission and every other administrative agency must and do have the discretion to develop policy in adjudicatory proceedings. *Potomac Electric Power Co. v. Consolidated Rail Corporation,* 367 I.C.C. 532 (1983).] Furthermore, Texas was given an additional opportunity to comment on all intrastate rail issues affecting it. Ex Parte No. 388, *State Intrastate Rail Rate Authority—P.L. 96-448* (not printed), served May 9, 183.

Finally, we note that the States cannot expect to be able to participate in every proceeding that may be binding upon them

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[8] Texas points to several cases prior to *Illinois Central, supra,* where the Commission stated it would not require the States to follow all Commission decisions. Inherent in this argument is the inconsistency that Texas could take notice of these cases but not others that are adverse to its position. In any event, the statements that Texas alludes to are inapposite, because we have, as noted above, specifically required the States to follow certain basic decisions that implement the statute and set forth important Federal standards and procedures. Moreover, to the extent that subsequent judicial constructions of the statute may indicate a stricter standard than we originally deemed applicable, we are not at liberty to ignore these precedential pronouncements.

(although, as noted, they have the opportunity to participate in every rulemaking). The decisions promulgated in our rulemakings and adjudications stand as our body of legal precedent. It is the nature of precedent that it is created in a proceeding in one instance and is used as a standard in dealing with subsequent similar cases. Thus, precedent is binding upon persons who were not necessarily parties to the proceeding in which it was created, and had no part in its formulation. Parties like Texas are bound by our precedents and cannot expect that such determinations will be considered anew in each new proceeding.

B. *Request for Adjudicatory Hearing* —Texas argues that it is entitled to an adjudicatory oral hearing on its application, because 49 U.S.C. 11501(f) requires the Commission to conduct a "full hearing" before taking action. Texas argues that "full hearing" under section 11501(f) means a full "adjudicatory" or "trial-type" hearing under sections 556 and 557 of the Administrative Procedure Act (APA), 5 U.S.C. 556 and 557. Texas also argues that adjudicatory procedures are required because the issues in this proceeding are issues of fact, not law.

Texas' claim that the full formal hearing requirements of sections 556 and 557 apply is without merit. First, section 11501 does not contain the express requirement for a hearing "on the record" that the Supreme Court has decided is a significant factor in deciding whether formal hearing procedures are required. *United States* v. *Allegheny-Ludlum Steel*, 406 U.S. 742, 757 (1972); and *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224, 238 (1973). Contrary to Texas' claims, the requirement of "a full hearing" is not the equivalent of a hearing "on the record." *See e.g. RCA Global Communications, Inc.* v. *FCC*, 559 F.2d 881, 885-86 (2d Cir. 1977) ("full hearing" does not require trial-type procedures); and *United States* v. *Florida East Coast R. Co., supra* at 243.

Second, neither the statute nor its legislative history specifies what procedures are required by the phrase "full hearing" in section 11501(f). Under these circumstances, the Commission has considerable discretion to establish appropriate procedures. Indeed, those procedures will be held inadequate only if they are found to be unreasonable. *Vermont Yankee Nuclear*

Power Corp. v. *NRDC*, 435 U.S. 519, 524 (1978); and *Carolina, C. & O. Ry.* v. *ICC*, 593 F.2d 1305, 1313 & n. 45 (D.C. Cir. 1979).

The commission has conducted these State certification proceedings using the APA's informal "notice and comment" rulemaking procedures. 5 U.S.C. 553. These procedures are adequate for the disposition of the issues in the certification proceedings. Texas argues here that an adjudicatory hearing is required for its proceeding, because it involves the factual issues of the State's intent and ability to regulate in accord with Federal law. However, the evidence of intent and ability that we examine is the State's written standards and procedures. The adequacy of those standards is a legal issue, not a factual one. While the State's conduct during provisional certification is also a matter of some importance, the State has made clear that its actions are based on a legal premise. There is no dispute as to what has actually occurred, and the demeanor of witnesses is of no consequence in the resolution of the issues.

C. *Other Requests for Modification and Clarification.*—Texas requests that we require all allegations of fact regarding intrastate rate regulation to be supported by affidavit. This request is denied. The Commission's rules do not require affidavits in informal rulemaking proceedings 49 C.F.R. 1110.[9]

TEXAS' STANDARDS AND PROCEDURES

Our analysis of Texas' standards and procedures is in three parts. We will first review Texas' revised standards and procedures in relation to the five specific deficiencies delineated in *Intrastate Rail, supra.* At the same time, we will discuss any other deficiencies related to those five subjects. Next, we will discuss deficiencies in other areas, in accordance with our min-

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[9]Texas made certain requests for clarification and modification that have already been disposed of in Ex Parte No. 388, *State Intrastate Rail Rate Authority—P.L. 96-448* (not printed), served May 9, 1983. In that decision, we indicated that: (1) parties that filed comments in a State certification proceeding were required to serve their comments on the affected State; and (2) that the State could file a reply. A time schedule was set forth to provide service of comments and for the States to reply. Our present decision will not further address the requests for clarification directed to these matters.

imum guidelines set forth in *Intrastate Rail, supra.* Finally, we will discuss any other problems. The problems are analyzed in some detail in part to inform Texas of the kinds of provisions that would be appropriate if it decides to reapply for certification, in accordance with section 11501(b)(3)(A), at some later date.

A. *Specific Problems Set Forth In Our February 8, 1982, Decision, and Related Matters.*—As previously noted, in *Intrastate Rail, supra,* we pointed out five specific problems in Texas' standards. Texas has submitted revised standards and procedures that generally fail to cure the problems, accompanied by argument that it should not have to make any changes.

1. *Suspension [Rule 5.553(b)(1)].*—Under 49 U.S.C. 10707(c)(1), this Commission may not suspend a proposed rate, classification, rule, or practice on its own motion. Correspondingly, in *Intrastate Rail, supra,* we concluded that States may not suspend on their own motion. We expressly pointed out that Texas' standards incorrectly provided for suspension on RCT's own motion.

Texas has revised its rule, eliminating the reference to suspension on RCT's own motion, and permitting only investigation on its own motion. Texas' revised rule, on its face, appears to cure the problem. However, Texas continues to maintain that suspension on its own motion is proper, and its argument strongly suggests that it will consider itself a party for the purpose of suspension requests.[10] Thus, its revised standards and procedures still are *intended* to provide in effect for suspension on its own motion, and the revision is unacceptable. Under these circumstances, Texas' rules, to follow Federal practice,

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[10] Texas argues that the term "protestant" in 49 U.S.C. 10707(c) encompasses both the usual opponents of a rate and the Railroad Commission of Texas (RCT) in proceedings where the RCT itself opposes a rate. Texas also argues this permitted, because there is a distinction in 49 U.S.C. 10707(c) between a "person" and a "party." Allegedly, a person supporting suspension need not be a protestant, and therefore Texas is a person entitled to show that suspension may be warranted. Texas' view would result in a strained reading of the statute, which we cannot accept given our long experience under the Federal procedures in the absence of persuasive legislative history to the contrary.

would have to state affirmatively that it would not suspend on its own motion.

2. *Texas' Jurisdictional Policy [Rule 5.551].*—In *Intrastate Rail, supra,* we pointed out that Texas mistakenly stated that its jurisdiction is coextensive with ours, and we explicitly noted Texas' failure to recognize it no longer has jurisdiction over general rate increases, inflation based increases, and fuel adjustment surcharges. Texas' revision still gives it authority coextensive with ours, "except where the states are expressly prohibited by statute from exercising such rights or powers." The general disclaimer seems a sufficient guarantee that RCT would not regulate in at least these three areas. However, the tenor of the wording suggests that Texas does not acknowledge the implicit limitation on its jurisdiction resulting from our decision in rulemaking and adjudicatory proceedings. Under section 11501, the term "standards and procedures" clearly encompasses such decisions. In *Wheeling-Pittsburgh, supra,* the court fully adopted this interpretation, holding, at 354:

> The phrase "standards and procedures" in section 11501(c) refers to standards and procedures promulgated and interpreted in decisions and orders of the ICC as well as those standards or procedures expressly incorporated in the Interstate Commerce Act.

The court earlier stated, at 353-54:

> We cannot agree that Congress intended that state regulatory authorities exercise a measure of discretion in the interpretation of federal standards and procedures under the Act. . . . we do not believe that this interpretation is consonant with the legislative history of the Staggers Act. The Conference Committee Report recites the conferees' intent "to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices etc., which are not in accordance with these goals. [H. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 106] . . .
>
> Little would be served were the states free to pursue their own interpretations of the Act apart from

> the standards and procedures promulgated by the Commission. To the contrary, the consistency between federal and state standards sought by the drafters of the Act would be undermined by such an interpretation. It seems evident, therefore, that Congress intended the term "standards and procedures" to encompass standards and procedures promulgated and interpreted by decisions of the ICC.

Furthermore, in *Illinois Central Gulf, supra*, where the issue was whether the policy of the Commission as expressed in an adjudicatory decision enforcing average demurrage agreements could be considered a "rule" or "practice" requiring conformity by a State commission under the Act, the court found that "a discrete reading of the statute requires that consistent rulings of the ICC must necessarily be incorporated and adhered to by state commissions exercising jurisdiction pursuant to the Staggers Act." 702 F.2d at 115. Thus, States must follow both the rules promulgated by the Commission and its adjudicatory decisions. Texas' failure to recognize this limitation renders its statement of jurisdictional policy inadequate.

3. *Contract Rates [Rule 5.558].*—Initially, in *Intrastate Rail, supra,* we discussed certain specific problems concerning Texas' contract rules. In addition, after we had adopted final contract rules implementing 49 U.S.C. 10713 in *Railroad Transportation Contracts,* 367 I.C.C. 9 (1982), we notified all States (including Texas) to rely upon these contract rules in filing or supplementing their submissions. *Illinois II, supra.* These contract rules have now been substantially affirmed in *Water Transport, supra.*[11]

Texas, however, has failed to adopt regulations that properly reflect the statutory requirements of 49 U.S.C. 10713 and our

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[11] The court remanded in one area only, ordering the Commission to provide easier discovery for parties having standing to challenge contracts. The court's ruling would require revision of 49 CFR 1300.310(b)(1). In all other respects, the Commission's rules have been affirmed. Texas must follow our presently applicable contract rules and upon our promulgation of modified discovery rules, Texas is subject to those rules.

contract rules,[12] or to correct the problems we specifically addressed in *Intrastate Rail, supra*; and, in practice, it enforces its own incorrect regulations, rather than applying Federal contract standards and procedures. In particular, Texas does not define the term "contract", nor state particular grounds for complaint or for review of a contract. It fails to set forth the limitations on the use of equipment in transporting agricultural commodities and the relief available to agricultural shippers, or to recognize the common carrier resonsibility to agricultural shippers that continues even when a contract exists. Texas' provisions concerning the procedures and timing for contract approval or disapproval, it special tariff rules for contracts, and its contract summary requirements are incomplete, or incorrect.[13]

Of greater importance is that Texas improperly continues to require overly broad disclosure of contract terms in contract rate tariffs (summaries). Under Rule 5.558(b)(1)(B), Texas provides that a contract summary containing each essential term of the rate contract must be filed. Texas initially defined "essential term" as "every term which would affect the economic or monetary cost of rail transportation service to the contracting shippers." [Rule 5.558(b)(2)(A).] In *Intrastate Rail, supra*, we stated that this insistence that all such terms be disclosed could destroy the confidentiality of contracts and chill negotiations between carriers and shippers, contrary to 49 U.S.C.

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[12] Nor has Texas adopted the later modifications of the contract rules which we adopted in *Railroad Transportation Contracts*, 367 I.C.C. 397 (1983), and *Contract Implementation Dates*, 367 I.C.C. 399 (1983).

[13] We specifically note that Texas' time limitations for approval or disapproval of contracts, as set forth in Rule 5.558(e)1)(B), need clarification. The rule provides that a contract rate shall be deemed approved by issuance of a decision within 30 days after the date on which a proceeding is commenced to review the contract rate. However, in accord with the Commission's regulations at 49 CFR 1039.3(f)(2)(i) and (ii), Texas' provision should read:

> (1) on the date the Commission approves the contract if the date of approval is 30 or more days after the filing date of the contract; or
>
> (2) on the 30th day after the filing of the contract if the Commission denies the complaint against the contract prior to the 30th day after the filing date of the contract.

10713. In response, Texas merely inserted "non-confidential" ahead of "term."

The revision Texas offers is inadequate. In *Rail Transportation Contracts, supra,* at page 25, we exclusively interpreted "essential contract terms" as including only those terms necessary to file a complaint under section 10713(d), to develop car data for application under sections 10713(d), (f), and (k), and to be used by the Commission's Contract Advisory Service. We set forth the required content of contract summaries at 49 CFR 1300.313. For Texas' standards to be in accord with Federal standards, it must adopt this interpretation. Texas' revision of its definition of "essential terms" to include "nonconfidential" terms affecting economic or monetary cost of service is inadequate, since it would still permit Texas to require disclosure of economic terms beyond the purview of 49 CFR 1300.313 wherever it perceives the terms to be "nonconfidential."

In addition, while making this change, Texas still argues that its original definition of "essential terms" is correct because: (1) the legislative history of section 10713 reveals a congressional intent to encourage the use of contracts only to promote competition, and not as an end in itself; (2) although contracts might be protected, the goal of competition will not be furthered by making contract terms secret; (3) the statutory limitation of the contract summary to nonconfidential terms [section 10713(b)] does not also apply to contract rate tariffs; and (4) whether a term is essential is a factual question to be determined case by case, and it need not follow the limited definition we have set forth. Texas' arguments are merely collateral attacks on the decision in *Railroad Transportation Contracts, supra,* which has already been affirmed in *Water Transport, supra.* It is inappropriate to challenge those findings in this proceeding.[14]

Finally, during the past year, Texas has rejected a number of contract tariffs. In numerous proceedings before this Commission, we have found that Texas' rejection of contract tariffs vi-

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[14] Texas' rule 5.558(b)(2)(B) [Contract Rate Tariff Title Page] improperly requires information that is not required by 49 CFR 1300.311.

olates Federal standards and procedures binding on Texas in its regulation of intrastate commerce. (For examples, see decisions cited in the Appendix.) Despite these numerous decisions, the substantial affirmance of our rules in *Water Transport, supra,* and the findings in *Wheeling-Pittsburgh, supra,* and in *Illinois Central Gulf, supra,* that the States must follow our standards and procedures, Texas persistently has refused to follow our contract standards, and complaints concerning its rejection of contract tariffs continue to be filed with us on a regular basis. Texas' repeated violations of these standards in the face of our numerous rulings demonstrates a clear intention not to regulate in accord with Federal law. The number of petitions to review decisions of RCT (over 30) is more than double that for all other States combined (about 15).

4. *Waiver of Hearing Upon Default of Respondent Railroad [Rule 5.553(d)(2)(C)(ii)].*—Texas' Rule 5.533(d)(2)(C)(ii) initially stated that upon general default of a respondent railroad, respondent would be deemed to have waived all further hearing in the proceeding, and the Commission could (without further hearing) find an assailed rate unreasonable. This provision was found improper in *Intrastate Rail, supra.* Texas has now eliminated the reasonableness language and modified the rule to apply to proceedings generally. The Rule now states that upon general default, the railroad waives further hearing and the RCt may then "determine the issues in the case, without further hearing, and order appropriate relief."

Texas' modified rule appears to be patterned after the Commission's former regulations at 49 CFR 1100.41 and 1100.44(b). However, after Texas submitted its modified standards and procedures, section 1100.41 was revised and redesignated as 49 CFR 1111.7, and section 1100.44(b) was revised and redesignated as 49 CFR 1112.3. If Texas should decide to reapply for certification, it should note any changes in those rules that may require revision of its Rule 5.553(d)(2)(C)(ii).

However, we are still concerned about Texas' understanding of the relationship between the conditions for finding rates unreasonable and a carrier's burden of proof. For example, if a carrier meets its burden in showing that the jurisdictional threshold limitation is applicable, but fails to submit further

evidence, it is nonetheless entitled to have the proceeding against it dismissed for lack of jurisdiction. Moreover, even if the carrier does not present evidence on the jurisdictional threshold, a complainant or protestant shipper has the burden of proof to show market dominance. Similarly, where the complainant or protestant has the burden of proof on the merits, that burden is not satisfied merely because the respondent carrier failed to completely comply with a requirement specified by RCT or by failure to appear.

5. *90-Day Prohibition on Refiling of Rates Found Unreasonable Upon Default of a Respondent Railroad [Rule 5.553(d)(2)(C)(ii)].*—In *Intrastate Rail, supra,* we specifically stated that Texas' provision for a 90-day [now modified to 60-day] prohibition on refiling of rates found unreasonable upon default of a respondent railroad was unduly restrictive and absent in Federal law. Texas acknowledges that its requirement is not imposed by Federal statute or rule, but argues that the prohibition is designed to facilitate implementation of 49 U.S.C. 10101a [national rail transportation policy (NTP)] and 10707 [investigation and suspension of new rail carrier rates, classifications, rules, and practices]. Texas submits that, since the effort required classifications, rules, and practices]. Texas submits that, since the effort required to refile a rate is minimal in comparison with the effort required to institute and conduct repeated proceedings challenging a rate (even when the respondent railroad defaults), a railroad could, by default and immediate refiling, make implementation of these sections virtually impossible. At the Federal level, there is a long-standing policy to permit carriers to change rates without any required delay period. In the absence of any evidence of railroad abuse involving habitual default and refiling, or of resulting hardship on itself or the public interest that would warrant a departure from the Federal standards, we conclude that the default rule would inhibit the railroads' ratemaking freedom and is therefore inconsistent with the NTP and section 10762.

B. *Other Major Areas As Set Forth In The Guidelines Of Intrastate Rail, supra.*—In *Intrastate Rail, supra,* we specifically stated that each State seeking certification must explain all its standards and procedures and demonstrate in its submission that they comport with Federal law in certain areas. (We

set out basic subjects to be addressed in the decision's appendix.) Texas' rules are deficient in the following areas:

1. *Prejustification of Rate Changes.*—The States are not permitted to require prejustification of rate changes. Some of Texas' requirements suggest that it may require railroads to prejustify rates [*See* discussion of Rule 5.656(c)(3), *infra*].

2. *Duration of Suspension/Investigation Proceeding.*—Under 49 U.S.C. 10707(b), suspension or investigation proceedings must be completed and a final decision made by the end of the 5th month (with a possible extension to the 8th month) after the rate, classification, rule, or practice is to become effective. Texas makes no provision for a decisional deadline in suspension or investigation proceedings.

Texas' rules also fail to acknowledge that if a railroad makes a tariff filing to adjust an intrastate rate, rule, or practice to that of similar traffic moving in interstate commerce, and Texas investigates or suspends such tariff filing, Texas must act finally within 120 days after the tariff was filed. Under 49 U.S.C. 11501(d), if the State does not act finally within 120 days, the carrier may apply to the Interstate Commerce Commission to review the matter. If the carrier elects not to refer the matter to the Commission, the State must decide the issue within 5 months, as discussed above.

3. *Timing of Rail Rate Changes [Rule 5.552].*—The provisions of Texas' Rule 5.552 are generally in keeping with Federal law, but contain certain minor errors. First, Texas' 20-day notice for rate changes that result in an increase in revenue [Rule 5.552(1)(A)] should also apply to changes resulting in decreased value of service and its 10-day notice for changes resulting in decreased revenue [Rule 5.552(1)(B)] should also apply to increased value of service. Texas should also make it clear that these time periods do not apply to contract rates. Furthermore, Texas provides [Rule 5.552(e)] that no rate shall be considered published under the provisions of the Staggers Act unless notice has been given in compliance with Rule 5.552. However, Texas fails to provide that, if a tariff is filed and becomes effective despite some defect, the tariff is nevertheless in effect and must be applied until canceled, amended,

or stricken from the files by the RCT after a proceeding on the matter.

4. *Adequate Revenues.*—Texas has set forth no provisions for consideration of revenue adequacy in its standards and procedures. The new statue, in 49 U.S.C. 10701a and 49 U.S.C. 10704(a)(2), (3), and (4), clearly states a fundamental Federal policy to promote adequate rail revenues. In keeping with these sections, the States must also acknowledge a similar policy, and reflect it in their standards and procedures.

5. *Market Dominance [Rule 5.555].*—Under 49 U.S.C. 10709, market dominance must be found before the reasonableness of rates (maximum rates) may be considered. The existence of market dominance must be determined within 90 days of the start of a Section 10707 reasonableness proceeding. Furthermore, the Commission is required to find no market dominance exists (and therefore, the Commission lacks jurisdiction to consider rate reasonableness) where a railroad's ratio of revenue-to-variable cost is less than the statutory threshold. However, even if a rate exceeds the threshold ratio, market dominance is not presumed, and other evidence of competition must be considered to determine whether it exists.

Under Rule 5.555(a), as modified, Texas appropriately states that market dominance must be found before a rate's reasonableness may be determined. However, Texas has no provision paralleling the statutory 90-day limit for market dominance determinations. It does not specifically delineate the jurisdictional thresholds [as set forth in 49 U.S.C. 10709(d)(2) or otherwise]. Nor does Texas acknowledge that, even if a rate exceeds the jurisdictional threshold ratios, market dominance is not presumed.

In addition, although Texas' revised standards incorporate the burdens of proof related to the various forms of competition in issue when determining the existence of market dominance, the rest of its handling of these kinds of competition is sketchy, and in some ways, incorrect. For example, Texas improperly limits its consideration of product competition and geographic competition to a consignee (receiver) when it should also apply to a consignor (shipper) [Rule 5.555(a)(4)(C) and (D)], and it

fails to note that the existence of alternative destinations is relevant to the existence of geographic competition. Finally, Texas does not provide that, where a rate is determined to exceed the jurisdictional threshold, other evidence of competition must be considered to resolve the market dominance issue, and the complainant/protestant has the burden of showing market dominance based on such evidence. If Texas decides to refile, it should review the guidelines set forth in *Market Dominance Determinations,* 365 I.C.C. 118 (1981).

6. *General Reasonableness Standards [Rule 5.555(c)].*

a. General Guidelines.—Pursuant to 49 U.S.C. 10707a(h), the authority to determine and prescribe reasonable rules, classifications, and practices may not be used directly or indirectly to limit the rates that rail carriers are otherwise authorized to establish under the Interstate Commerce Act. The statute provides, 49 U.S.C. 10701a(a), that any rate may be established, unless it is prohibited by a specific provision.

b. *Rates in Effect At Time of Staggers Act.*—Under section 229 of the Staggers Act, any rate in effect on October 1, 1980, whose reasonableness was not challenged by complaint filed on or before March 30, 1981 [within 180 days of the statute's effective date (October 1, 1980)], is deemed to be lawful and may not later be challenged as unreasonable. That time limitation applies to intrastate rate challenges as well,[15] but Texas' standards do not account for this limitation.

c. *Maximum Rates.*—As mentioned earlier, Texas' maximum reasonableness standards do not reflect the important revenue adequacy considerations mandated by 49 U.S.C. 10701a(b)(3). In addition, Texas fails to provide that in determining whether a rate is reasonable it must consider:

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[15] Under section 229(c), the limitation does not apply to any rate [intrastate or interstate] under which the volume of traffic transported during the 12-month period immediately preceding the effective date of the Staggers Act did not exceed 500 net tons and has increased tenfold within the 3-year period immediately preceding the bringing of a challenge to the reasonableness of such rate.

(1) the amount of traffic that is transported at revenues that do not contribute to going concern value and efforts made to minimize such traffic;

(2) the amount of traffic that contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and

(3) the carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues.

See 49 U.S.C. 10707a(e)(2)(C).

d. *Zone of Rate Flexibility.*—The only reference in the proposed rules to the zone of rate flexibility is in relation to the burden of proof in reasonableness cases. [Rule 5.555(c)(1)(A)]. Texas' rules do not sufficiently describe other zone provisions in two significant respects necessary to permit the rate flexibility mandated by section 10707a. First, States may not investigate or suspend adjustments made to base rates to cover inflation. Thus, base rates increased by a cost adjustment factor may not be investigated or suspended. Second, subject to the conditions stated in section 10707a, a railroad may increase a rate by 6 percent per year (to a maximum of 18 percent) over the 4-year period following enactment of the Staggers Act. Thereafter, railroads not earning adequate revenues as defined by the Commission may increase rates 4 percent per year. States may only investigate or entertain complaints involving the 6-percent and 4-percent zones of rate flexibility in accordance with 49 U.S.C. 10707a. Neither the 6-percent nor 4-percent zone increases may be suspended.

e. *Refunds.*—Texas has no provisions involving refunds. Under 49 U.S.C. 10707, if a rate increase is suspended but ultimately found reasonable, the carrier must collect the difference from the shippers plus interest. If a suspended rate decrease is found reasonable, the carrier may refund. The State should also establish procedures that parallel our provisions for waiver of insignificant amounts adopted in *Special Docket Proceedings—Simplification of Procedures,* 365 I.C.C. 544 (1982), and No.

37130 (Sub-No. 23), *Special Docket Proceeding—Exemption from Letter-of-Intent Requirements Involving Amounts of $2000 or Less* (not printed), served January 17, 1983).

7. *Discrimination.*—Texas sets forth no discrimination standards. Under 49 U.S.C. 10741, differences in rates, classifications, rules, and practices do not amount to discrimination if they result from different services. Discrimination does not apply to contract rules, surcharges, or cancellation of joint rates under 49 U.S.C. 10705a, separate rates for distinct rail services, rail rates applicable to different routes, or expenses authorized under 49 U.S.C. 10751.

8. *Exemptions [Rule 5.561].*—Texas' exemption standards and procedures indicate that, unless it grants its own exemption, it will continue to regulate intrastate shipments, even if this Commission has exempted corresponding interstate shipments. In addition, Texas actively argues that Federal exemptions are not binding upon Texas[16] (*See* discussion of General Tariff Rules, *infra*) and presently applies its conflicting standards. This conduct is unacceptable.

In *Illinois II, supra,* at 153-154, based upon the goals of the Staggers Act, the rail transportation policy, and serious practical considerations, we concluded that, once a particular category of traffic is exempted by the Commission, this becomes a standard from which States cannot deviate. We reasoned that inconsistencies between Federal and State exemptions would cause unjustifiable operational and/or marketing difficulties for railroads conducting business for the same class of traffic in both a regulated and unregulated environment. Consequently, Texas is required by law to follow our exemptions as to rates, classifications, rules, and practices.[17] *See also Wheeling-Pittsburgh, supra,* and *Illinois Central Gulf, supra.*

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[16] See No. 39627, *Petition Under 49 U.S.C. 11501(c) by Missouri-Kansas-Texas Railroad Company, et al., for Review of an Order of the Railroad Commission of Texas* (not printed), served January 23, 1984 and the proceeding in No. 39635, *Petition Under 49 U.S.C. 11501(c) for Review of an Order of the Railroad Commission of Texas* (not printed), served February 15, 1984.

[17] We also recognized a theoretical possibility that, as to a particular exemption, conditions in a State could be unique. We emphasized that allegations to this effect may be handled through revocation of the exemption by us, on our own motion, or on petition to this Commission by a State.

In addition, where we exempt transportation, the regulation of that transportation is no longer a part of the Interstate Commerce Act. Thus, although the States must regulate in accordance with the provisions of the Interstate Commerce Act, the exempted transportation is no longer a part of the Act for the States' enforcement purposes.

Illinois II applied to all States, and we gave all of the States time to file modified standards and procedures. Texas had clear notice of what was expected but did not comply. Furthermore, the nature of its subsequent actions on exemptions shows that Texas did not misunderstand what was required, but deliberately chose not to comply.

9. *Transportation of Recyclable Materials.*—Texas sets forth no standards with respect to the transportation of recyclable materials. In setting standards for the rail transportation of recyclable materials, the States must act consistently with the Federal law as set forth at 49 U.S.C. 10731. Furthermore, nonferrous recyclables presently may have a rate reflecting a ratio no higher than 146 percent of revenue-to-variable cost. *Cost Ratio for Recyclables—1980 Determination,* 364, I.C.C. 425 (1980). [*Note also* Ex Parte No. 394 (Sub-No. 1), *Cost Ratio for Recyclables—1983 Determination*, which is pending. The decision in this proceeding may change the established ratio.]

C. *Other Matters*

1. *Texas' General Tariff Rules.*—In RCT Docket No. 000145 RRIN, *Investigation of General Rules of RCT, Item 150 Series, SWFB Tariff 1 Series,* issued September 12, 1983, Texas prescribed (separately from the standards submitted to us) six revised General Tariff Rules that govern the way in which intrastate rail rates are calculated.[18] These are its Rules 1, 2, 3, 4, 7, and 8. There was no Rule 5, and Rule 6 was canceled by the order.

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[18] The presently effective rules are a revision of earlier General Tariff Rules. The Texas Class I Railroads have challenged both the revisions and the original rules. (*See* footnote 3, *supra.*) We note that the original rules were quite similar to the revisions, and that our views concerning the revisions would apply equally to the original rules.

The Class I railroads contend that Texas' General Tariff Rules violate Federal standards and procedures. They argue that Texas' rules infringe upon the carriers' ratemaking capabilities and limit their flexibility in setting rates. They submit that these rules are a part of ratemaking and are properly left to the discretion of the carrier. They therefore seek abolition of Texas' rules. Texas argues that it has authority to prescribe General Tariff Rules under 49 U.S. 11501(b)(1) and 10321, and that its rules are in keeping with Federal statutes and promote the NTP.

We agree with the Texas Class I railroads' position and reject the arguments of the RCT. Texas' rules so restrict the carriers' flexibility in setting rates that they are at odds with the fundamental goals of the Staggers Act. For example, the rules are inconsistent with two of the NTP's principal purposes, namely, "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation ***[and]*** to minimize the need for Federal regulatory control ***." 49 U.S.C. 10101a(1) and (2).[19] They also are inconsistent with 49 U.S.C. 10701a(a), under which carriers have generally been given the authority to establish any rate for transportation or other service provided by the carrier, *unless* prohibited by the statute's maximum or minimum rate standards, and 49 U.S.C. 10707a(h), under which the authority of the Commission to determine and prescribe reasonable rules may not be used *directly or indirectly* to limit the rates that rail carriers are otherwise authorized to establish.[20] The tariff

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[19] Texas argues that language in section 10101a that states that the Commission is to "ensure" effective competition requires States to actively exercise their rulemaking powers to foster and preserve competition. However, we interpret this language as contemplating that free carrier activity in the market place will create competition, and thus will replace regulation as the force establishing appropriate transportation rates. It does not contemplate regulation as the means to create competition, but merely as a substitute when competition does not exist.

[20] Texas has maintained that its rules are in keeping with section 10707a(h), because they govern only the application of rates and do not affect a rail carrier's freedom to make rates. This is a false distinction, since the prescribed applications indirectly limit the rates that rail carriers are authorized to establish.

rules are also contrary to certain Commission imposed rate-making standards. Thus, although we agree that a State may generally promulgate tariff rules, we would be remiss if we were to permit Texas, or any other State, to apply tariff rules that violate Federal standards and procedures. Our discussion of the particular rules follows.

The Texas railroads are especially concerned about Rules 3 and 8, and we shall thus address these first. Texas' Tariff Rule 3 requires that the lowest rate for any carrier's route between two points must also be the rate for all other routes in the State between the same points. The Texas Class I rail carriers state that, because Rule 3 forces all carriers to meet the rate of whatever carrier has the short-line mileage between two points, it curtails their freedom to choose their rates for themselves and thus deprives them of rate flexibility. Texas responds that Rule 3's rate equalization places all carriers on an equal footing regarding price, thereby making all carriers competitive for the traffic.

It is clear on its face that the requirement that the carrier use a certain route to calculate the rate limits its rate-making ability in violation of section 10707(h). Furthermore, since Rule 3 requires the same rate to apply for all carriers regardless of the mileage of the actual route of movement, Texas is, in effect, attempting to regulate the maximum level of rates. However, maximum rates are subject to 49 U.S.C. 10701a and the market dominance provisions of 49 U.S.C. 10709. Rule 3 would indirectly circumvent these maximum rate standards.

The Texas Class I Rail Carriers also maintain that Rule 3 reflects a pre-Staggers Act view of antidiscrimination enforcement that is at odds with 49 U.S.C. 10741(f)(4), which states that prohibitions against discrimination "shall not apply to . . . rail rates applicable to different routes." Texas argues in rely that Rule 3 does not prohibit a carrier from charging a different rate for a different route, because it permits a rail carrier to elect *not* to have the rate equalization provision apply. However, this election: (1) must be made at the time the freight is tendered; or (2) may be made before the freight is tendered, if given in writing. (The applicable rate as decided by the carrier would have to be based on the rate for its own route, and could not be based on any other competitive route.)

Apart from the limited election provision, Rule 3's general terms are inconsistent with the spirit of section 10741, which would permit different rates for different routes. Furthermore, the election requirement puts an unreasonable burden on the carrier to establish a variance from the rate equalization provision. Carriers' prerogatives with respect to rate flexibility should not depend on such a condition precedent, which Texas admits (as indicated above) is intended to have a chilling effect on price competition.

Rule 8 is based on 49 U.S.C. 10726, commonly referred to as the long-and-short-haul clause. Rule 8 prohibits a rail carrier from charging a higher rate for a shorter distance than for a longer distance over the same route (where the longer route includes the shorter), unless the carrier obtains prior approval. It also provides that the same rate must apply in both directions between two points (equalization of rate for a haul and the back haul).

Although Texas' rule basically follows section 10726, the rule is in conflict with an exemption in *Rail General Exemption Authority*, 367 I.C.C. 234 (1983). There, we exempted all rail rates and charges from the need for prior Commission approval when departing from the restrictions of 49 U.S.C. 10726. We stated that formal complaints could be filed, but emphasized that section 10726 must be treated as part of and consistent with other parts of the Interstate Commerce Act, especially with respect to the underlying standards for judging rate reasonableness and illegal discrimination. We further stated that section 10726 may not conflict with fundamental ratemaking principles dictated by statute and applicable to all rates.

Texas argues that it is not bound by Federal exemption decisions like that in *Rail General Exemption Authority, supra,* unless a similar proceeding is filed before the RCT and Texas chooses to adopt the exemption. It also maintains that Rule 8 does not impose the prior restraint on deviation from section 10726 that *Rail General Exemption Authority* addressed. However, as we have emphasized throughout this decision, States are required to follow Federal standards and procedures. The consistency between Federal and State standards would be undermined if States were free to pursue their own independent interpretations of the Act. *Wheeling-Pittsburgh, supra*; and *Il-*

linois Central Gulf, supra. This reasoning is particularly applicable to exemptions. *Illinois II, supra.*

Texas' Tariff Rule 2 is based on the aggregate-of-the-intermediates clause of section 10726 and is related to Rule 8. It provides that a through rate between two given points shall not exceed the sum of the rates applying between such given points and a point intermediate. Rule 2, like rule 8, violates our exemption in *Rail General Exemption Authority, supra.*

Texas' Tariff Rule 1 specifically prescribes the manner in which distance (mileage) rates shall be based. Rule 4 dictates that when an exact mileage distance does not appear in a rate table, the mileage is to be "rounded up" to the next mileage distance that appears. Rule 7 provides that in all cases, the lowest of the potentially applicable class, commodity, or exception rates will apply, and that the applicable weights (minimum or actual, whichever is higher) shall apply. By their explicit terms, each of these rules directly or indirectly determines the manner in which rates for intrastate rail transportation are calculated. Although the carriers legally could adopt these rules themselves, imposition of these terms by the State infringes upon the carriers' rights to determine what rates they will charge, in violation of section 10707a(h).[21]

We do not hold here that a certified State may not promulgate *any* tariff rules, but only that the rules considered in this proceeding are not in accordance with Federal standards and procedures.

2. *Protests and Interim and Final Decisions [Rule 5.553(h)].*—Texas provides that decisions not to investigate or suspend rates are interim decisions but that a dismissal of a protest is a final decision. This is inconsistent, since a dis-

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[21] In addition, the State's imposition of Rule 1 appears to be inconsistent with section 10741(f)(4), since Rule 1 could require carriers to apply the same rate over different routes, and section 10741(f)(4) specifically permits different rates for different routes. Furthermore, even if a carrier may still establish point-to-point rates different from those required by the rule, Rule 1 places the burden on the carrier to deviate from the rule.

missal of a protest, in essence, involves a decision not to investigate or suspend. If it refiles, Texas should clarify whether a decision not to investigate or suspend shall be considered a final decision for purposes of its jurisdiction.

3. *Filing Deadline for Protests and Replies [Rule 5.554(a)].*—Texas provides that protests against rail rates must be filed at least 5 days before the proposed effective date of the rate both where the rates are published on 20-days' notice, and where they are published on 10-days' notice. Replies must be filed within 15 days from the date the protest is filed.

This differs from Federal protest limitations for rates filed on 20 and 10-days' notice. Under 49 CFR 1132.1(g), protests involving rates published on 20-days' notice must reach the Commission at least 10 days before the proposed effective date of the protested matter, and protests against rates published on 10-days' notice must be filed at least 5 days before the proposed effective date. For both rates published on 20-days' notice and those published on 10-days' notice, replies must reach the Commission not later than the fourth working day prior to the scheduled effective date of the protested schedules. 49 CFR 1132.1(f).

Although we have stated that the States have some discretion with respect to particular time limits (*Illinois I, supra,* at 871), we note that Texas' proposed timing for protests and replies does not appear consistent. While it would permit 15 days for reply to a protest, this period is largely nugatory, since the protest may be filed as late as 5 days before the effective date and the reply should be filed prior to the effective date of the rate. Furthermore, Texas, as a practical matter, does not provide time for consideration of a rail carrier's reply before the rate becomes effective.

4. *Filing Deadline for Complaints [Rule 5.554(a)].*—Texas provides that complaints charging that an existing rail rate is unreasonable may be filed at any time after the deadline for filing protests to the rate. 49 U.S.C. 11706 sets forth a statute of limitations for complaints. Complaints filed with Texas are subject to this statute of limitations. Texas should also note that complaints may no longer be filed against rates in effect

on October 1, 1980. *See* discussion B.6.b. *Rates in Effect at time of Staggers Act, supra.*

5. *Content of Protests and Complaints [Rule 5.554(b)(1)(G)].*—Texas provides that all protests and complaints against rail rates should contain a verified statement of facts in support, showing, as pertinent here:

> ***,
>
> (ii) the revenue/cost ratios of involved movements,
>
> (iii) all underlying data used to perform protestant/complainant's analyses of the variable costs associated with involved movements,
>
> (iv) the methodology and cost data base used in the analyses of the variable costs associated with involved movements,
>
> (v) that respondent railroads have market dominance over the traffic involved.

Texas also provides that the requirements of clauses (ii), (iii), and (iv) may be waived on a showing that such information is not reasonably accessible to the protestant/complainant.

These requirements are relevant to maximum rate reasonableness proceedings and, to a certain extent, joint rate or route cancellations and surcharges under 49 U.S.C. 10705a. However, other rate proceedings would not always involve these issues. For example, a discrimination proceeding would not necessarily require evidence concerning revenue/cost ratios and market dominance is irrelevant. Moreover, tariff applicability questions do not involve cost questions. Cost evidence and market dominance evidence should not be required in cases where it is not germane. *See* Ex Parte No. 388 (Sub-No. 4), *Intrastate Rail Rate Authority—Florida* (not printed), served March 18, 1983. *See* also 49 CFR 1132.1(a), which sets forth the requirements for protests against tariffs and 49 CFR 1131.1, 1131.2, and 1131.5 setting forth the requirements for complaints.

6. *Reply to Protests and Complaints. [Rule 5.554(b)(2)(F)].*—Texas provides that replies to protests and complaints against rail rates should include:

> ***,
>
> (ii) the revenue/cost ratios of involved movements,
>
> (iii) all underlying data used to perform protestant/complainant's (sic) analysis of the variable costs associated with involved movements,
>
> (iv) the methodology and cost data base used in the analyses of the variable costs associated with involved movements.

Texas requires respondents to explain, to the extent possible, any differences between revenue/cost data provided by respondents and data provided by the protestant/complainant. Our findings concerning the content of protests and complaints applies to replies as well. *See* also 49 CFR 1132.1(f), concerning replies to protests, and 49 CFR 1131.9, concerning answers to complaints.

7. *Burden of Proof [Rule 5.555(c)(3)].*—Texas states that a complainant alleging that an existing rate is unreasonably high will bear the same burden of proof in regard to reasonableness as would a protestant contesting a proposed rate. This is incorrect.

Under 49 U.S.C. 10701a(b)(2)(B), the respondent carrier may have the burden of proving that a proposed rate is reasonable if the proposed rate is: (1) greater than that authorized under the zone of rate flexibility [49 U.S.C. 10707a] or above the applicable revenue-variable cost percentage set forth in 49 U.S.C. 10707a(e)(2)(A); *and* (2) *the Commission begins an investigation* under 49 U.S.C. 10707. Section 10707 applies only to investigations. No parallel requirement applies to complaint proceedings, since complainants always have the burden of proof.

8. *Joint Rate Cancellations and Surcharges [Rule 5.563].*—Texas recognizes that a rail carrier may cancel a joint rate

under 49 U.S.C. 10705a. However, it does not recognize that a rail carrier may cancel a joint rate under 49 U.S.C. 10705. *See Family Lines Rail Decision-Unilateral Can. of Joint Rates*, 365 I.C.C. 464 (1981).

We also note that, although rail carrier authority to apply and cancel joint rate surcharges under section 10705a(a) had been due to expire on September 30, 1983, the Commission extended the provisions of section 10705a(a) to September 30, 1984. Ex Parte No. 448, *Consolidated Rail Corporation—One Year Extension of Surcharge Authority Under 49 U.S.C. 10705a(a)* (not printed), served September 30, 1983.

9. *Failure to Respond to Preliminary Inquiries [Rule 5.565(c)(3)].*—Texas' Rule 5.565(c)(3) could be interpreted to require prejustification of some sort. The Rule provides that a rail carrier failing to respond to a preliminary inquiry conducted prior to the institution of a formal proceeding reviewing the rate may be held in partial default and to have waived all further hearing in regard to matters for which a filing was required but not made in any subsequent proceeding instituted to review the involved rates.

The Commission has no rule analogous to Texas' rule and it appears a denial of due process. A rail carrier may be held to respond in formal proceedings. However, even in formal inquiries, as previously discussed, certain prerequisites may be necessary before adverse action may be taken against the carrier.

10. *Rail Costing Standards [Rule 5.566].*—While Texas was not required to do so, it has attempted to implement rail costing standards.

Texas' definition of variable cost is an appropriate definition for minimum rate regulation. However, to the extent its definition is intended to embrace maximum rate standards, it is inapposite. We further note that with respect to minimum rates, Texas does not define going concern value—the key statutory test. *See* Ex Parte No. 355, *Cost Standards for Railroad Rates,* 364 I.C.C. 898 (1981).

Texas also sets forth various data bases, including Western District costs [Region VII] and Region V costs. Western District

costs cover Regions V and VI combined. However, Texas provides no explanation why Region VI costs are not specifically delineated, as Region V is.

11. *Limited Liability Rates.*—Under 49 U.S.C. 10703, railroads may publish rates under which the liability of the carrier is limited to a value established by the written declaration of the shipper or by written agreement between shipper and railroad. Texas does not address this matter.

CONCLUSION

As discussed above, Texas' redress of specific problems that we set forth in *Intrastate Rail, supra*, is inadequate and its address of the general subject areas we outlined is incomplete. Furthermore, Texas has staunchly refused to comly with Federal law as expressed in this Commission's decisions (rulemaking and adjudicatory), and has consistently flouted our rules. (*See* contracts discussion, *supra.*) Based on this evidence, we find that Texas' standards and procedures are wholly deficient and that it is unwilling to regulate intrastate rail rates in accordance with Federal law. We find that Texas' application for certification must be denied.

Furthermore, it would be contrary to the spirit of section 11501 to allow provisional certification to continue where there is wholesale abrogation of so many key provisions of the Staggers Act and of our decisions (rulemaking and adjudicatory), where Federal standards and procedures are so grossly ignored or violated, and where a State clearly will not use continued provisional certification to bring its standards and procedures into compliance with Federal law. We find that Texas' provisional certification must be revoked.

We further find that all Texas rail matters will become subject to the jurisdiction of this Commission in accordance with 49 U.S.C. 11501(b)(4)(B). Accordingly, rail carriers in Texas shall comply with this Commission's regulations, including the filing of intrastate tariffs with this Commission.

We have provided that our denial of certification will not take effect until 30 days after service of this order. In the interests of a smooth transition from State to Federal administration,

we direct RCT to complete to the maximum extent feasible all pending matters capable of final resolution within this 30-day period. For pending cases that cannot be completed during the period, RCT should transfer the relevant dockets and files to Commission custody as soon as possible (and in no event later than the effective date of this decision). RCT is directed not to commence any new proceedings within the 30-day period. Instead, any filings received by RCT should be forwarded immediately to the Secretary of the Commission.

Parties that wish to continue litigating cases that were pending before the RCT and think the RCT cannot complete them within the 30-day period shall advise the Commission's Office of Proceedings. In the case of pending section 229 cases parties shall consult with the Commission's Office of Hearings. In this way, we will develop, with the parties, appropriate steps in each case to establish procedural schedules.

This decision will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The application of the Railroad Commission of Texas for certification to exercise jurisdiction over intrastate rates, classifications, rules, and practices for intrastate transportation is denied.

2. The provisional certification of the Railroad Commission of Texas is revoked.

3. Texas intrastate rates, classifications, rules, and practices for intrastate rail transportation is subject to the jurisdiction of the Interstate Commerce Commission in accordance with 49 U.S.C. 11501(b)(4)(B).

4. Notice of our action will be given to the general public by delivery of a summary of this decision to the Director, Office of the Federal Register for publication. The decision will also be available for inspection in the Office of the Secretary, Interstate Commerce Commission.

5. This decision shall be effective on May 20, 1984.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison. Commissioner Gradison did not participate.

James H. Bayne
Acting Secretary

APPENDIX

No. 39658, *Petition of Missouri Pacific Railroad Company Under 49 U.S.C. 11501(c) for Review of an Order of the Railroad Commission of Texas* (not printed), served March 7, 1984; No. 39655, *Petition Under 49 U.S.C. 11501(c) for Review of Order of Railroad Commission of Texas* (not printed), served February 27, 1984; No. 39650, *Petition Under 49 U.S.C. 11501(c) for Review or Order of Railroad Commission of Texas* (not printed), served February 17, 1984; No. 39649, *Petition Under 49 U.S.C. 11501(c) for Review of Order of Railroad Commission of Texas* (not printed), served February 17, 1984; No. 39644, *Petition Under 49 U.S.C. 11501(c) for Review of Order of Railroad Commission of Texas* (not printed), served February 10, 1984; No. 39631, *Petition Under 49 U.S.C. 11501(c) for Review of Order of Railroad Commission of Texas* (not printed), served February 27, 1984; No. 39627, *Petition Under 49 U.S.C. 11501(c) for Review of Order of the Railroad Commission of Texas* (not printed), served January 23, 1984; NO. 39625, *Petition of the Missouri-Kansas-Texas Railroad Company Under 49 U.S.C. 11501(c) for Review of an Order of the Railroad Commission of Texas* (not printed), served January 18, 1984; No. 39624, *Petition Under 49 U.S.C. 11501(c) of an Order of the Railroad Commission of Texas* (not printed), served January 12, 1984, No. 39597, *Petition of Missouri Pacific Railroad Company under 49 U.S.C. 11501 for Review of an Order of the Railroad Commission of Texas* (not printed), served November 22, 1983; No. 39596, *Petition under 49 U.S.C. 11501(c) for Review of an Order of the Railroad Commission of Texas* (not printed), served November 18, 1983; No. 39593, *Petition of Missouri Pacific Railroad Company under 49 U.S.C. 11501 for Review of an Order of the Rail-*

road Commission of Texas (not printed), served November 18, 1983; No. 39588, *Petition of the Southern Pacific Transportation Company under 49 U.S.C. 11501 for Review of an Order of the Railroad Commission of Texas* (not printed), served November 9, 1983; No. 39587, *Petition of the Southern Pacific Transportation Company under 49 U.S.C. 11501 for Review of an Order of the Railroad Commission of Texas* (not printed), served November 8, 1983; No. 39580, *Petition of Southern Pacific Transportation Company under 49 U.S.C. 11501(c) for Review of an Order of the Railroad Commission of Texas* (not printed), served November 3, 1983; No. 39581, *Petition under 49 U.S.C. 11501(c) for Review of an Order of the Railroad Commission of Texas* (not printed), served November 3, 1983; No. 39577, *Petition of Oklahoma, Kansas and Texas Railroad Company under 49 U.S.C. 11501 for Review of an Order of the Railroad Commission of Texas* (not printed), served October 26, 1983; No. 39553, *Petition of Southern Pacific Transportation Company under 49 U.S.C. 11501 for Review of an Order of the Railroad Commission of Texas* (not printed), served October 18, 1983 [embraces Nos. 39554, 39555, and 39556, same title, and No. 39557, *Petition of St. Louis Southwestern Railway Company under 49 U.S.C. 11501 for Review of an Order of the Railroad Commission of Texas]*; No. 39526, *Petition of the Southern Pacific Transportation Company under 49 U.S.C. 11501(c) for Review of an Order of the Railroad Commission of Texas* (not printed), served October 11, 1983; No. 39503, *Petition of Missouri-Kansas-Texas Railroad Company under 49 U.S.C. 11501 for Review of an Order of the Railroad Commission of Texas* (not printed), served September 28, 1983 [embraces Nos. 39504 and 39510, same title]; No. 39478, *Petition of Missouri-Kansas-Texas Railroad Company under 49 U.S.C. 11501 for Review of a Decision of the Railroad Commission of Texas* (not printed), served September 15, 1983; No. 39487, *Petition of Missouri Pacific Railroad Company under 49 U.S.C. 11501 for Review of an Order of the Railroad Commission of Texas* (not printed), served September 13, 1983; No. 39474, *Petition of the Southern Pacific Transportation Company under 49 U.S.C. 11501(c) for Review of an Order of the Railroad Commission of Texas* (not printed), served September 12, 1983; No. 39435, *Petition of the Southern Pacific Transportation Company under 49 U.S.C. 11501(c) for Review of an Order of the Railroad Commission of Texas* (not printed), served August 8, 1983, aff'd by decision served September 7, 1983; No.

38404, *Petition of the Atchison, Topeka, and Santa Fe Railway Company under 49 U.S.C. 11501(c) for Review of an Order of the Railroad Commission of Texas* (not printed), served August 12, 1983; No. 39387, *Petition of Southern Pacific Transportation Company under 49 U.S.C. 11501 for Review of a Decision of the Railroad Commission of Texas* (not printed), served July 25, 1983; and No. 39174, *Petition of Burlington Northern Railroad Company for Review of a Decision of Railroad Commission of Texas Rail Rate Board Pursuant to 49 U.S.C. 11501* (not printed), served April 25, 1983.

APPENDIX D

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 82-1693

D.C. Docket No. A-80-CA-487

THE STATE OF TEXAS, ET AL.,
Plaintiffs-Appellants,

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS and STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,
Plaintiffs-Intervenors-Appellants,

versus

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,

and

SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET AL.,
Defendants-Invervenors-Appellees.

Appeals from the United States District Court for the Western District of Texas

Before WISDOM, REAVLEY and JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiffs-appellants and plaintiffs-intervenors-appellants pay to defendants-appellees and defendants-intervenors-appellees, the costs on appeal to be taxed by the Clerk of this Court.

APRIL 23, 1984

Issued as Mandate: